Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,
Petitioner,

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; JEFF WINHOLT, M.D.; DEACONESS HOSPITAL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN H. METZ
COUNSEL OF RECORD
ATTORNEY AT LAW
441 VINE STREET
SUITE 4400
CAREW TOWER
CINCINNATI, OHIO 45202-3016

ATTORNEY FOR PETITIONER

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED FOR REVIEW

1. When the highest court of the State provides a "right" to its citizens to have a jury be informed of possible bias as to whether medical malpractice witnesses who testify at trial have a "commonality of insurance" interest with the defendant can that substantive right be abolished by the "discretion" of the federal trial court who rules that such may "prejudice" the jury under F.R.Evid. 403?

2. Whether this Court should invoke its' supervisory power to protect the process of orderly trials where the Circuit Court finds "no doubt" that defense counsels' trial conduct was improper (e.g. personal attacks on plaintiffs' counsel [being called "the devil"; "offensive, distasteful;" "disgraceful;" {guilty of} "creative lawyering;" and being accused of withholding evidence from the jury]) and the Court finding characterizations were made "frequently" and "the comments were crucial to the central issue before the jury;" yet the Circuit Court by its affirmance rewards unprofessional trial conduct and conflicts with another Circuit and state courts.

3. Whether the local practice (utilized in this case) of choosing the number of alternate jurors based upon the expected length of the trial; then converting the alternate jurors into the final jury (and not dismissing them) thereby violates the Constitutional rights of a plaintiff in requiring plaintiffs to unanimously convince a larger number of jurors based solely on the anticipated length of a trial.

4. Is a citizen's right to their loved one's body [as recognized in Brotherton v. Cleveland, 923 F.2d 477 (1991)] violated when a state statute provides a "good faith" immunity to those involved in human tissue and organ "harvesting" when arguendo they merely ask for donation "for any purposes authorized by law" without further explanation and they then completely remove not only the consented human body parts (corneas and inner ear bones), but further "harvest" the decedent's eyeballs; remove ten (10) sections of decedent's skin and completely remove decedent's long leg bones (femurs).

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OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Sixth Circuit, decided August 29, 1997 is annexed hereto as an appendix. Also annexed as an appendix in an order of the United States Court of Appeals for the Sixth Circuit, dated October 9, 1997 which denied petitioner's petition for a rehearing.

JURISDICTION

(a) The judgment of the trial court was entered on September 8, 1995, as a result of a wrongful death medical negligence case brought pursuant to 42 U.S.C. 1332 due to diversity jurisdiction of the parties. The Magistrate Judge denied post trial motions for new trial and NOV on January 3, 1996.

(b) The judgment of affirmance of the United States Court of Appeals for the Sixth Circuit is dated August 29, 1997.

(c) The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing is dated October 9, 1997.

(d) Jurisdiction to review the judgment in this question by certiorari is conferred by Title 28 U.S.C. Section 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

"No person shall....be deprived of life, liberty, or property, without due process of law."

Federal Rule of Evidence 403:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations or undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Civil Procedure 48:

"The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

The syllabus of Ohio law as stated in Ede v. Atrium South OB-GYN, Inc., (71 Ohio St.3d 124).

> "In a medical malpractice action, evidence of a **commonality of insurance interests** between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause."

Ohio Revised Code Section 2108.08: Immunity.

"A person who in good faith acts, or attempts to act, in accordance with section 2108.01 to 2108.12 of the Revised Code, or the anatomical gift laws of another state, is not liable for damages in any civil action or subject to prosecution in any criminal proceedings for his act.

STATEMENT OF THE CASE

Basis Of Jurisdiction In First Instance

The district court below was presented with a diversity case involving a wrongful death medical negligence case pursuant to 28 U.S.C. 1334. The decedent was a resident of Michigan (and where his estate and its representative (the widow) reside and all defendants were residents of the State of Ohio. Pursuant to 28 U.S.C. 636(c) and Fed. R. Civ. Pro. 73(b), the parties consented to the jurisdiction of U.S. Magistrate for final judgment and that an appeal from the Magistrate's judgment would lie directly to the Court of Appeals for the Sixth Circuit.

Statement Of Facts

This is a wrongful death medical negligence case. A complaint was filed by the widow/administratrix of the estate against orthopedic surgeon, Dr. Noyes, (and his medical corporation), the anesthesiologist; and the hospital.

Decedent, William Gleason, was a 62 year old schoolteacher, father of four, Boy Scout master from Detroit, Michigan. He underwent a total knee replacement operation by defendant orthopedist in November, 1991. He was a "high risk" for deep vein thrombosis and subsequent pulmonary

embolism. Defendant orthopedic surgeon called in a specialist to handle decedent's blood thinning even prior to undertaking the first procedure. However, defendants failed to call in any such specialist for the subsequent two orthopedic procedures (January and February, 1992) performed on decedent by defendants. Several hours after the last procedure, decedent suddenly complained of shortness of breath and then became completely unresponsive and was pronounced dead due to pulmonary emboli (blood clots to the lungs).

Plaintiff's experts testified that had decedent's medical condition and blood clot been appropriately recognized, standard of care treatment would have prevented the subsequent pulmonary embolism which took Gleason's life. Testimony was that Gleason's chances of survival, if properly treated, was "as close to 100% as you can get." [R.41, T.p. 474-475]. [Even defendant's expert, Dr. Kennealy's statistics showed 92% of patients survive when treated. [R.54, T.p.1785].

Organ-Tissue "Harvesting"

Shortly after the death defendant hospital called Mrs. Gleason in Detroit. They asked her if she wished to make any anatomical gifts from her husband's body. She said she would agree to donate her husband's inner ear bones (someone in her family had a hearing deficit) and she would donate the corneas (the thin layer of cells on the outer part of the eye). But nothing else. However, when the body arrived back in Michigan Mrs. Gleason was shocked and quite distressed when the undertaker said that they could not guarantee an open casket. The hospital had permitted anatomical harvesting of not only the "consented" inner ear bones and corneas; but permitted the entire enucleation of

both eyeballs; ten (10) skin graft removals; and removal of the both femurs bones (the large thigh/leg bone) to be "harvested" from decedent's body. The undertaker said that they needed about 5-6 people to carry the body-bag because the body lacked stability.

ARGUMENT

1. When the highest court of the State provides a "right" to its citizens to have a jury be informed of possible bias as to whether medical malpractice witnesses who testify at trial have a "commonality of insurance" interest with the defendant can that substantive right be abolished by the "discretion" of the federal trial court who rules that such may "prejudice" the jury under F.R.Evid. 403?

The Ohio Supreme Court's syllabus [which is the "law" of Ohio] in Ede v. Atrium South OB-GYN, Inc., (1994) 71 Ohio St.3d 124, states:

> "In a medical malpractice action, evidence of a commonality of insurance interests between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause."

In the case sub judice, at least two of defendants' experts had a "commonality of insurance" with the defendant. The trial court herein refused to follow the syllabus of Ohio law as stated in Ede and refused to permit plaintiff to inform the jury of this "commonality of insurance interests" between the experts and defendant. The court utilized Federal Rule of Evidence 403 to abrogate substantive Ohio law!

A federal court is to apply state law whether "declared by its Legislature in statute or by its highest court." (Erie R. Co. v. Thompkins, (1938) 58 S.Ct. 817, 822, 304 U.S. 64,78, 82 L.Ed. 1188.

Here the Supreme Court of Ohio in Ede specifically adopted a state rule to effectuate an substantive policy of the State; i.e. to permit jurors the knowledge of possible bias or prejudice of an expert witness. Ohio's highest court clearly recognized in its decision the inequity created by withholding from the jury information which impacts directly on their main function, i.e. weighing the credibility of an expert's testimony. The Supreme Court of Ohio certainly recognized the "conspiracy of silence" which permeates medical negligence cases and created this rule. (See: Trull v. Long, (1993), 621 So.2d 1278). The Ohio Supreme Court has subsequently continued to cite Ede as precedent; viz: (Johnston v. University Mednet, (1995), 71 Ohio St.3d 608, 646 N.E.2d 453); Davis v. Immediate Medical Services, Inc. (1997), 80 Ohio St.3d 10, 684 N.E.2d 292).

It is important to note that the Court in its syllabus did not simply defer the decision back onto the trial court's "discretion" on a case-by-case basis; but it affirmatively set forth the law which judges must follow if the facts present themselves. This decision is important in that it clearly is not a question of "discretion" but is a question of substantive law of Ohio to be applied.

This error would be prejudicial enough in an ordinary case; however, as the Circuit court clearly noted in this case, "the central issue before the jury, ...was whose experts were more credible." [p.3 of Circuit opinion].

Here the focus of the defense strategy was to attack the

plaintiff's experts at all costs. Assail the plaintiff's attorney personally and each plaintiff expert. The jury certainly should have been able to have information as to any possible bias, prejudice on the part of defense witnesses.

Defense counsel repeatedly stressed "credibility" of plaintiff's experts in closing argument. Clearly, bias or prejudice of defense witnesses was essential in providing a fair trial.

Defense counsel's closing argument stressed:

> "..Consider credibility of Dr. Berger, a hired expert" [T.p.2613]...."credibility...which one of those three would YOU feel comfortable with going to to establish a doctor-patient relationship?" [T.p.2614]

As this Sixth Circuit panel recognized, the main issue for jury determination was "whose experts were more credible." [Circuit opinion, p.3]. Therefore, the matter of "commonality of insurance" (bias) was crucial to a fair consideration by the triers of fact. It was plain error for the trial court to refuse to follow the law of Ede and provide the full measure of Ohio law to plaintiff.

Further, the decision sub judice on this basic issue is in conflict with the Eighth's Circuit's Charter v. Chleborad, M.D., 551 F.2d 246 (CA8, 1977). The Charter court in reversing the identical trial court's ruling held:

> "In our opinion the probative value of the evidence far outweighs any danger of unfair prejudice.... Plaintiff's claim rested for the most part on the credibility of his expert

witness....Considering the importance of expert testimony in this case we cannot conclude that the trial court's exclusionary ruling was mere harmless error." [at p.249].

A federal court should not be permitted to abrogate substantive State-created rights in the guise of evidentiary rulings. This critical issue in cases of substantial rights of litigants in medical negligence cases needs clarification throughout this country's Bench and Bar to promote fair trials.

2. Whether this Court should invoke its' supervisory power to protect the process of orderly trials where the Circuit Court finds "no doubt" that defense counsels' trial conduct was improper (e.g. personal attacks on plaintiffs' counsel [being called "the devil"; "offensive, distasteful;" "disgraceful;" {guilty of} "creative lawyering;" and being accused of withholding evidence from the jury]) and the Court finding such characterizations were made "frequently" and "the comments were crucial to the central issue before the jury;" yet the Circuit Court by its affirmance rewards unprofessional trial conduct and is contrary to other Circuits and this Courts historical protection.

Here the Sixth Circuit found:

"We have no doubt that several of the comments by defense counsel were improper. First, the attorneys personally vouched for the veracity of their clients' case and against the validity of Barbara Gleason's; they engaged in personal attacks on plaintiff's counsel; they insinuated that plaintiff's experts had fabricated their testimony; and they argued evidence which was not in the record. Second, these

comments were crucial to the central issue before the jury, which was whose experts were more credible. Fourth, since Barbara Gleason offered sufficient evidence from which to conclude that her husband's death could have been prevented through different prophylactic measures, the case was close and could have been affected by defense counsel's improper conduct. Fifth, the no-cause verdicts are consistent with jury prejudice." [p.3-4 Circuit opinion, see appendix]

The Circuit court, however, concluded that since plaintiff's counsel did not object to each repeated defense infraction, such precluded the court from reviewing the claimed error, on any basis other than the "plain error" rule.

Nonetheless, even under the "plain error standard" the court found that "it was probably 'clear and obvious under current law' that defendants should not have been allowed to make some of the statements complained of, plaintiff's failure to object requires her also to show that the improper argument prejudicially affected the outcome of the trial." [p.5 Circuit opinion]

Inexplicably, and illogically, the Circuit court then concluded that since the verdict was "supported by the evidence," the verdict was affirmed. This is, if not absolutely contradictory, at least illogical, considering the court's own findings that defendants' misconduct was "crucial to the central issue before the jury."

It is now commonplace in this type of litigation, that when defense is concerned about losing the case, they "go for broke" in the closing with "no holds barred." In the repeated litany of improper conduct, objections to such comments are not capable of "un-ringing" the bell of such comments in the minds of the jury. Additionally requiring plaintiffs to

continually object buttressed the sought impression with the jury that plaintiff is trying to keep matters from the jury. The worst that can happen - a mistrial. They then avoid a bad result and then have the advantage of causing plaintiffs the Herculean task of re-financing another trial. Heads I win, tails you lose! Without court intervention, this abuse will continue to occur and deny justice.

One of the three defense counsel herein has been ethically reprimanded by the Sixth Circuit in **Abrahamsen v. Trans-State Express**, (6th Cir., 1996), 92 F.3d 425, 35 Fed.R.Serv.3d 840. The Court found said counsel's "bad faith during discovery" led to the "further misconduct" where he "committed the even worse sin of knowingly putting on Reagan's false testimony." The Court specifically noted that this counsel's course of conduct:

> "show contempt for the rules of discovery and violate the trust placed in counsel to obey the fundamental rules of court. In doing so, counsel prevented the Plaintiffs from fully and fairly presenting their case."

The court remanded the case back to the trial court for consideration of even further sanctions against said defense attorney. This same counsel has also recently been recommended to be suspended from the practice of law in the State of Ohio for a period of six months for ethical violations during litigation. [findings of the Board of Commissions on Grievances and Discipline of the Supreme Court of Ohio contained in Appendix].

However, the verdict against the claims of this widow stands for the proposition that such conduct is well worth the risk most of the time. Here as the Sixth Circuit noted the

unprofessional tactics provided a significant defense victory. Until the courts demand professional and ethical trial conduct, some members of the trial bar will continue to utilize unethical and unprofessional conduct that not only produce individual injustice for a single litigant, but also diminish the entire profession and legal system in the eyes of the public. This Court has consistently had a historical hand in maintaining the stature expected in the federal courts of this land. (See: Sacher v. United States 343, U.S. 1, 72 S.Ct. 756 (1952); Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935).

From the time of opening statement to closing argument the defense was a unified attack, taking every pot-shot against plaintiff's counsel available. All three defense counsel are experienced trial attorneys and cannot claim naivete. Even in opening statement the court cautioned defense counsel as to violating the "golden rule." Defense counsel know full well that once they get these comments out before the jury no number of objections or instructions will be able to erase these violations from the jury's minds. The old saying that one cannot "un-ring" a bell can never be more appreciated than in situations like this where defense counsel blurts out defendant doctor has "never had a patient die"; "has the lowest morbidity rate of any orthopedic clinic in the United States of America", etc. One cannot seriously expect a cautionary instruction to be of any realistic good. This "realistic" fact has been previous recognized in City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, (CA6, 1980) this court noted: "As the Fifth Circuit has so accurately observed:

> "...the bench and bar are both aware that cautionary instructions are effective only up to a certain point. There must be a line drawn in

any trial where, after repeated exposure of a jury to prejudicial information... cautionary instructions will have little, if any, effect in eliminating the prejudicial harm. (O'Rear v. Fruehauf Corp., 554 F.2d 1304, 1309 (5th Cir. 1977).'"

Defense counsel repeatedly talked of not being "guilty of malpractice" while the law of Ohio is that it is clearly reversible error to convey such is a standard to the jury. (Kyle v. Fok, (1969), 18 Ohio St.3d 70, 247 N.E.2d 457; Bahm v. The Pittsburgh & Lake Erie Rd.Co., (1966), 6 Ohio St.2d 192, 217 N.E.2d 217).

Likewise, It is improper for an attorney to express his personal belief or opinion on the case. (ABA Code of Professional Responsibility, Cannon 7, Disciplinary Rule DR 7-106(C)(4) of the Code of Professional Responsibility; State v. Smith, (1984), 14 Ohio St.3d 13, 470 N.E.2d 883). However, the hospital's attorney expressed to the jury: "I believe the anatomical gift donation issue was a side issue..."

Contempt for our justice system was rampant throughout this litigation. As the testimony showed, prior to deposition, defense counsel met with the physical therapist to inform her: "your note is the problem" with this case. She testified that it was "then" that she decided she had made a charting "error." She meant to write "suprapatellar" (the area just around and above the knee); and she did not mean to write "thigh." The trial court even commented "That's a question of whether anybody is going to believe any of her testimony."

Another defense tactic occurred in the deposition of defendant anesthesiologist. Plaintiff's counsel requested to

see documents he reviewed in preparing for the deposition including the large three-ringed binder in front of the witness. He admitted it was a binder of medical articles given to him by the defendant-orthopedic surgeon. Contrary to the rules of discovery, defense counsels refused to permit plaintiff's counsel to see the binder. Eventually plaintiff had to file a motion to compel which resulted in a different binder being produced, (even though plaintiff had requested the original be preserved).

The outright disregard for the system was further demonstrated during a deposition of Dr. Craig Roberts, (one of the resident physicians) who claimed he "did not understand" terms such as : "medical "specialty"; "medical residency"; or a "definition of orthopedic surgery."

A defense witness, Dr. Miller, gratuitously commented to the jury that if defendants did what plaintiff's experts said "we'd be here in another lawsuit."

Even though the trial judge forewarned counsel to make simple objections, defense made countless "speaking objections" which were mini-lectures to the jury. In fact at one point, the court admonished defense counsel "I don't want you to give a lecture in front of the jury."

Even though in closing argument it is improper to express personal belief or opinion; to attempt to appeal to passion and prejudice; or to berate opposing counsel, (Ethical Consideration 7-37) defense counsel's closing began:

> "The remarks by Mr. Metz...I take great resentment. I think that to turn this case into a mud slinging, conspiratorial, finger pointing, record changing conduct on the part of these medical providers **I FIND OFFENSIVE,**

> **DISTASTEFUL, and as I think you will see, IT'S ABSOLUTELY INCORRECT.** ....If there is any conspiracy...attempt to create something out of nothing...it is on the part of PLAINTIFF'S EXPERT WITNESSES."

Defense counsel continued: "You're intelligent....I know you understand it...You are smarter than **Mr. Metz** is giving you credit for." (Alvarez v. State, 574 So.2d 1119 (Fla.App. 1991, "insult to intelligence" - improper).

It is improper closing argument to attack opposing counsel's honesty or integrity (Code of Professional Responsibility, Ethical Consideration 7-37). However, one defense counsel continued to attempt to paint a picture of dishonesty for the jury and personalized the attack toward plaintiff's counsel. He referred to the medical chart in such a spirit: "...They're not made for lawyers **LIKE MR. METZ**.....conspiracy.. is outrageous and is absurd. It's ridiculous."

Defense counsel tried to make the jury indignant against plaintiff's counsel, by saying:

> "..this is a serious allegation. ..he [Metz] has stood up in this courtroom, and **he has pointed his finger** at Frank Noyes, and he said: 'You caused the death of William Gleason,' the only patient that Dr. Noyes has ever lost....**in 3-1/2 weeks there hadn't been ONE RECOGNITION BY THIS LAWYER, NOT ONE, THAT JUST MAYBE THAT DR. NOYES and his staff....FEEL BAD ABOUT LOSING THIS MAN. NOTHING."**

"They tried to create some kind of monster, some kind of corporate monster...he is a human being and he lost ONE PATIENT, ONE TIME."

At this point the jury would be incensed if plaintiff's counsel did not come out and apologize to defendant! Defense counsel put in the jury's mind that plaintiff's counsel is evil for not being "sympathetic" to Dr. Noyes! This type of inflammatory argument is not proper in a court of law. It has nothing to do with the evidence, but has only one purpose: to denigrate opposing counsel in the eyes of the jury.

While "great latitude" is permitted in closing argument, counsel may not be abusive to a witness to excite the passion of the jury against a witness and say the witness is lying. (Webster v. Rees, 729 F.2d 1078 (CA6, 1984); United States v. Cooper, 827 F.2d 991 (CA4, 1987). It is improper to imply a witness has fabricated or contrived his testimony. (State v. Rose, 112 N.J. 454, 548 A.2d 1058 (1988).

Nonetheless, in reference to plaintiff's internist-expert, defense counsel stated: "Now, now the creation begins." Defense referred to plaintiff's expert as "those people that THEY have characterized as experts...with that complete lack of background."

Where counsel calls into question the integrity of a witness during closing argument which is not supported by evidence, the trial court is required to intervene so as to prevent further improper argument (Plas v. Holmes Constr. Co., (1952), 157 Ohio St. 95, 47 O.O. 86, 104 N.E.2d 689). No objection is or should be necessary under such circumstances. (Igo v. Coachmen Industries, Inc., 938 F.2d

650, 33 Fed.R.Serv. 871, (CA6, 1991)).

Defense counsel in discussing his experts commented: "These are not people that we dragged in from some expert service from San Francisco or Florida" [referencing plaintiffs' experts]. "Mr. Metz was contacted..Record reviewed with a fine-tooth comb..and then he calls Ellen Rieback.....she's this expert BROKER that's been referred to.....**SHE CANVASSES THE COUNTRY TO FIND SOMEONE, ANYONE, WHO CAN FIND SOMETHING OR ANYTHING.**" Plaintiff's counsel DID object and was summarily "overruled" which was more indication that the court would indeed permit such argument, even lacking evidentiary foundation.

Defense counsel remarked to the jury, without any foundation in the record, that plaintiff's expert's opinion that he "probably came up with it while he was on the airplane on the way to the trial."

Counsel was not subtle in disparaging opposing counsel, the judicial process and the witness's credibility:

> "**I think typical in many cases, you know, LAWYERS TRY TO THROW A LOT OF MUD ON THE WALL AND ARE HOPEFUL THAT MAYBE A LITTLE BIT OF IT WILL STICK. THEY SAY A PRAYER AND CROSS THEIR FINGERS. AND I THINK THAT'S WHAT WE HAVE HERE WITH THESE, WHAT I CONSIDER SPURIOUS, ALLEGATIONS THAT HAVE NO FOUNDATION.** .....Consider [the] credibility of Dr. Berger, A HIRED EXPERT."

The court in Calloway v. Lemley, 382 So.2d 540 (Ala.1980) found reference to expert witness as a "hired gun" to be improper argument. [Accord: Spisas v. State, 102 Nev. 119, 716 P.2d 231 (1986)].

Defense counsel twice implores the jury "Let's be fair here. Let's be fair" implying that plaintiff (or this process) is not being "fair."

Defense counsel were relentless in continuing the improper and personal attack against opposing counsel, saying:

> "**Mr. Metz** has presented this case... in a very strange manner. **Mr. Metz** ...named 50 authors....WHY AREN'T ONE OF THEM IN HERE...BECAUSE THEY AGREE WITH DR. NOYES." [R. 62, T.p. 2566]

Clearly here for defense counsel to suggest that because plaintiff did not bring in every "authoritative" author referred to throughout the trial that they were all in favor of defense is not only improper, but further defeats the entire policy of **Evid. R. 813(18)**. It is improper to for counsel in argument to refer to the opposing party's failure to call a witness where the witness is equally available to either party (Smith v. Covell, 100 Cal. App.3d 947, 161 Cal. Rptr. 377 (1980); Bank v. Cunningham, 674 S.W.2d 561 (Mo.App. 1984)); particularly improper where there is nothing in the record to indicate that such witness(es) would have been adverse. (Biruk v. Wilson, (1967), 50 N.J. 253, 234 A.2d 225). Before a party can properly argue an inference of unfavorable testimony from a missing witness, the party must establish the witness was peculiarly within the adversary's power to produce. (Chicago College of Osteopathic Medicine

v. George A. Fuller Co., (1983,CA7 Ill) 719 F.2d 1335, 14 Fed. Rules Evid. Serv. 635, appeal after remand (CA7 Ill) 776 F.2d 198, later proceeding (CA7 Ill) 801 F.2d 908, 5 F.R. Serv.3d 1242).

Plaintiff's counsel was even made out by defense attorney to be satanic:

> "and when he (Noyes) has to LOOK THE DEVIL IN THE EYE in this courtroom, you talk about conspiracy...Come on."

The name calling was not yet done, defense counsel said:

> "To characterize Dr. Noyes and his clinic as AN ASSEMBLY LINE OPERATION IS DISGRACEFUL AND NOT RIGHT. But don't, don't let **MR. METZ** short change you. Don't let **him** short change you. Rhoda McMahon [physical therapist] being in this lawsuit is **TERRIBLE**. Dr. Winholt, just as bad."

However, in fact, the physical therapist was not a party at trial.

It is clearly improper for argument to "mislead" the jury. However, defense counsel stated: "Mr. Metz stood up here for an hour and talked to you about a pulmonary embolus. He did not die from a pulmonary embolus." This was not only misleading but contrary to defense counsel's own admission in opening statement that "he died very quickly from an acute, huge pulmonary embolism" But again it makes the jury believe plaintiff's counsel and made a false

representation.

Defense counsel sought juror "sympathy" in saying:

> "Dr. Noyes..fighting this lawsuit under these sets of circumstance IS JUST NOT RIGHT."

Hospital counsel told the jury that the allegations "we take very personally." Defense counsel then again (as he did in opening statement) attempt to place a "criminal" cast on the case and infer a higher standard by saying: "NO ONE IS GUILTY....no one is EVEN GUILTY or liable for a bad result." According to the Ohio Supreme Court, use of the word "guilty" in civil damage actions is reversible error. (Kyle v. Fok, supra,; Bahm v. The Pittsburgh & Lake Erie Rd. Co., supra.

Hospital counsel then clearly gives his personal opinion that plaintiff is lying:

> "I can't figure out why Mrs. Gleason would make such an allegation...if really was a mistake, why wouldn't Mrs. Gleason call or why wouldn't Mrs. Gleason call or why wouldn't she write a letter?... **She waited two years and hired a lawyer to sue the hospital.**"

He continued the personal attack and boldly asked the jury to "protect" them:

> "**Mr. Metz has done a fine job of CREATIVE LAWYERING** for his client here in putting on a three-and-a-half week trial, but we're not here to grade the lawyers.

> We're here to render fairness, and we ask you to recognize the truth.....The jury is the hospital's only protection....**WE NEED YOUR PROTECTION**."

Defense closing went beyond any "implication" of untruthfulness of plaintiff's witnesses and created a fictional scenario:

> "The only alleged criticism of Dr. Winholt comes from this Dr. Berger....he comes to you through one of these hiring services where ANY lawyer CAN APPARENTLY call up and say to this Helen Rieback, **"I NEED SOMEONE TO SAY THAT THERE'S GREEN CHEESE ON THE MOON." SHE LOOKS DOWN THE LIST AND MAKES SOME CALLS AND APPARENTLY SAYS, "HEY, I FOUND SOMEONE FOR YOU TO SAY THERE IS GREEN CHEESE ON THE MOON."** ....the quality or lack of the quality of the evidence that Mr. Metz has brought before your.."

Arguing a fictional scenario that is not supported by the record was found to be improper closing argument in Dillon v. Bundy, (1991), 72 Ohio App.3d 767, 596 N.E.2d 500, at 506.

After such a personal "warfare" attack, plaintiff's counsel attempted to begin to respond, however, the trial court foreclosed any retaliation/rehabilitation stating: "settle down now....that's enough from both of you. I'm not going to permit any more discussion of this issue" [T.p.2623] which under the circumstances a response should have been

permitted. So the jury was left with one impression [that of defendants'] while plaintiff's counsel stood with his hands tied behind his back, unable to respond.

During plaintiff's attempt to respond defense counsel stood up in making an objection and remarked in front of the jury "if he wants to talk about how many experts he's consulted and wouldn't come in here, he can do that, too." This was clearly improper and intentionally calculated to inflame the jury and have them falsely speculate that there were other witnesses who refused to testify.

The conduct of trial counsel was addressed by the Supreme Court of Ohio in Jones v. Macedonia-Northfield Banking. Co., (1937), 132 Ohio St.341, 7 N.E.2d 544, at 548:

The proper role of the attorney at the trial table is not that of a contestant seeking to prevail at any cost but that of an officer of the court, whose duty is to aid in the administration of justice and assist in surround the trial with an air conducive to an impartial verdict.....**If the party represented by offending counsel prevails in the verdict and the result has been brought about by the latter's misconduct to the prejudice of the opposing party, a new trial should be promptly granted."**

The Jones Court found "unhesitatingly" that an objection was not necessary to raise the question of misconduct. The Court continued:

> "The judge who presides over a cause is not a mere umpire; he may not sit by and allow the grossest injustice to be perpetrated without interference. It is his duty in the executive

> control of the trial to see that counsel do not create an atmosphere which is surcharged with passion or prejudice and in which the fair and impartial administration of justice can not be accomplished. It was the duty of the trial court to stop the argument and require counsel to proceed in an orderly and lawyer-like manner."

One would certainly expect that the level of trial counsel would be no less in the federal forum, than that which is expected of the members of the State Bar. However, the Circuit Court's opinion stands for the proposition that trial counsel can be as unprofessional as they wish, and unless there is an objection the courts have no power to correct such misconduct. This is in conflict with the Sixth Circuit's published opinion Igo v. Coachmen Industries, Inc., 938 F.2d 650, 33 Fed.R.Serv. 871, (CA6, 1991) which clearly did uphold the dignity of trial conduct. In Igo the court reversed a verdict where the conduct of counsel was "outrageous" and resulted in a "complete miscarriage of justice." The court noted that opposing counsel **did not object to most** of the offending statements. However, the court held:

> "A trial court cannot sit quietly while counsel inflames the passions of the jury with improper conduct, even if opposing counsel does not object. The trial court should have censured and stopped this conduct." [at p.653].

Other courts have held that character attacks and name calling require a new trial despite lack of a timely objection. (Al-Site Corp. v. Della Croce, 647 So.2d 296 (Fla. App., 1994).

Judge Ford firmly confirmed the judicial view of improper trial counsel conduct in Jones v. Olcese, (1991), 75 Ohio App.3d 34, 598 N.E.2d 853, at p.861:

> "...this type of venomous argumentation has no place in the trial courts of this district, or any other for that matter. It is better left in a landfill that would accept it before the oracle who wishes to voice it crosses the threshold of a hall of justice. Attorneys who practice in the field in question here are not endowed with special privileges to engage in such excesses! Civility remains the hallmark of professionalism!"

The Eighth Circuit in Kroger Grocery & Baking Co. v. Stewart, 164 F.2d 841 (CA8, 1947) stated:

> The attitude of this Court and of other federal appellate courts toward the interjection of irrelevant personalities and appeals to prejudice or passion in final argument, has been so clearly stated in many cases as to call for no further discussion. New York Central R. Co. v. Johnson, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 [citations omitted]....This Court, in the interest of an orderly administration of justice, will continue to do all that reasonable may be done to assure litigant that a trial in a District Court of the United State shall be so conducted that the verdict of the jury fairly may be assumed to be based upon an impartial consideration of the evidence and the applicable law." [at p.844-45] [emphasis added]

This should be the clear duty of all federal courts throughout all the Circuits.

As the court stated in Hubbard v. McDonough Power Equipment, Inc., 83 Ill.App.3d 272, 404 N.E.2d 311 (1980):

> "The right of trial by jury is not a license for counsel to indulge in abusive behavior, nor does it grant a privilege to embarrass and belittle one's adversary to such an extent that his opportunity of obtaining respectful consideration at the hands of the jury is destroyed or seriously jeopardized."

The U.S. Supreme Court in Sacher v. United States, 343 U.S.1, 72 S.Ct. 756 (1952) made it "clear" in stating:

> "this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. **But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling.** [emphasis added]

Our justice system is currently suffering from public ridicule. As did the widow herein, most litigants experience one and only one trial. A citizens' limited venture into the justice system is the hallmark by which they will judge their country and its fundamental fairness and justice. In a time when national headlines decry the increasing "lack of civility" in our courts; and various jurisdictions require lawyers to

attend ethics and professionalism seminars; the Courts should not countenance "unprofessional" conduct during a trial; not reward it, as was done herein. Trial counsel should be able to go into a courtroom and try a case without having to wallow in the mud and engage in a berating by opposing counsel, and thereby demeaning our entire justice system.

The trial bar always expects the utmost professionalism in the federal courts. This case clearly presents conduct which should not be rewarded, but should be reversed and plaintiff given a new, fair trial.

3. Whether the local practice (utilized in this case) of choosing the number of alternate jurors based upon the expected length of the trial; then converting the alternate jurors into the final jury (and not dismissing them) thereby violates the Constitutional rights of a plaintiff in requiring plaintiffs to unanimously convince a larger number of jurors based solely on the anticipated length of a trial.

The practice utilized in this District of picking a jury of six plus an additional number of jurors depending on how long the trial is expected to last and then adding any "alternates" to the full jury at the end of the case violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. (Amend. V).

When a litigant must obtain a "unanimous" verdict, it is obvious that, in this day and age of independent thinking, the higher the number of jurors, the less likely one will be able to obtain a "unanimous" verdict. Why should a plaintiff who has a 3-4 week trial have to convince 3-4 more jurors (unanimously) than if the case only takes two days to try?

Civil Rule 48 on its face is unfair and

unconstitutional. It provides for a jury of six or possibly twice that number! A litigant should have a right to know how high the hurdle is going to be to clear before running the race. This vacillating number of jurors does not give fair warning to litigants and imposes a heavier burden depending on the length of your case (as determined in this District) which lacks a rationally basis. Appellant herein did object to the procedure [T.p. 2450-51].

The case sub judice was lengthy and medically complex. To try to teach and convince any more people than necessary presents a unfair and unconstitutional burden. Civil defendants would certainly welcome the imposition of a criminal conviction burden imposed on plaintiffs of unanimously convincing a dozen jurors! However, such would clearly deny many deserving plaintiffs from attaining civil justice in our society.

The practice of increasing a plaintiff's burden based purely on the length of their trial should clearly be held unconstitutional.

If the federal courts are going to increase the number of jurors from six (6); then the requirement of unanimity should be abandoned. Litigants should have the right to know before trial how many citizens they need to convince to win their case. A burden of a moving target is fundamentally unfair.

4. Is a citizen's right to their loved one's body [as recognized in Brotherton v. Cleveland, 923 F.2d 477 (1991)] violated when a state statute provides a "good faith" immunity to those involved in human tissue and organ "harvesting" when arguendo they merely ask for donation ...* * "for any purposes authorized by law"

without further explanation and they then completely remove not only the consented human body parts (corneas and inner ear bones), but further "harvest" the decedent's eyeballs; remove ten (10) sections of decedent's skin and completely remove decedent's long leg bones (femurs).

The court included in the jury instructions that the hospital "may not be held liable" if it "acted in good faith" when they exceeded the scope of anatomical gift donation.

Even taking evidence as defendant presented, there were two nurses who each individually spoke with Mrs. Gleason over the phone. The statute mandates that consent be by "a telephone call in which two persons receive THE MESSAGE." **(O.R.C. 2108.04(E))**. If there are two separate phone conversations (i.e. not a conference call), then by definition two persons cannot be sure they both heard THE same message. Contrary to Mrs. Gleason's testimony, defendant's nurses both testified rather parrot-like that Mrs. Gleason gave consent to donate **"for any purposes authorized by law."** However, both admitted neither has an understanding of what that means.

Nurse Smith testified that the "procedure" at the hospital is to fax the consent for anatomical gift to the donating person. The evidence was undisputed that the hospital faxed a consent form for an autopsy, but did NOT fax the form regarding the anatomical donations. In fact contrary to Nurse Smith, Nurse Schaze testified that she did not even "consider" faxing the anatomical gift consent form to Mrs. Gleason (even though this was the same nurse who faxed the autopsy consent form).

Further the statute assumes as a prerequisite to any "good faith" that the form is correct filled-out and the correct

information is retrieved, which if factually is not the scenario, the statutory "good faith" immunity should not be applicable.

If the "professionals" (who are obtaining alleged "consent" to take anatomical portions from a loved one's body) do not understand or know what the terms of their consent mean, how can they explain them to the alleged donor? Mrs. Gleason testified that she asked if giving the inner ear bones and corneas would affect the open-casket funeral and she was told by these same nurses it would not.

A person does have a constitutional property right in their loved one's dead body and third-parties cannot "take" that right without due process. (Brotherton v. Cleveland, 923 F.2d 477 (1991). Here, a blanket "good faith" immunity is unconstitutional under the facts of this case where defendants themselves cannot explain what their alleged "consent" means, therefore, any "consent" was not an informed consent and not valid. Clearly the vast departure from the limited consent did not warrant the blanket "good faith immunity" jury charge under the circumstances.

REASONS FOR ALLOWING THE WRIT

This was a case of serious issues; 1) federal trial evidentiary ruling abrogating substantive State law: 2) pervasive and repeated unprofessional and unethical trial conduct; 3) the constitutional issue of having a higher burden (more unanimous jurors) if your case takes longer to try; and 4) harvesting of human organs without consent.

Here a widow has expended her life-savings to pursue justice only to become a play-toy in the arena of the hard-ball players. In the federal court system this lady deserves the standards of professionalism and honor which the federal

courts engender. After all plaintiff has been through, to have the case reduced to a unethical mud-slinging contest is not what any citizen of this United States should expect as a litigant. This court can make a significant contribution to the entire area of medical negligence litigation by sending a message that this type of misconduct will not be rewarded, that this Court will not look the other way and allow injustice to prevail. Plaintiff respectfully prays this Court to grant this Writ or whatever other proper relief it deems proper under these circumstances so that this lady can have a fair trial without a jury that is inflamed with inappropriate arguments and personal attacks on counsel. This case is important not only for the Gleason family but for all other victims of medical negligence that only ask for a level playing field and the respect deserving of the federal system.

Respectfully submitted,

/s/_____
John H. Metz
Counsel of Record
4400 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
(513) 241-8844
Attorney for Petitioner

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 96-3194/96/97

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
August 29, 1997
Leonard Green, Clerk

On Appeal from the United States District Court for the Southern District of Ohio

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,
Plaintiff-Appellant Cross-Appellee,

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; RHODA MCMAHON;
Defendants-Appellees,

JEFF WINHOLT, M.D.; DEACONESS HOSPITAL;
Defendants-Appellees Cross-Appellants.

/

Gleason v. Noyes, et al.
Nos. 96-3194/96/97

BEFORE: MARTIN, Chief Judge; RYAN and BATCHELDER, Circuit Judges.

RYAN, Circuit Judge. In this diversity personal-injury action, plaintiff, Barbara Gleason, appeals from a jury verdict finding no cause of action on her claims of malpractice, lack of informed consent, and negligent infliction of emotional distress brought on behalf of the estate of her late husband, William C. Gleason. Plaintiff alleges that at trial defense counsel's closing arguments were improper and prejudicial; that the trial court erred in several of its evidentiary rulings; that two of the jury instructions were incorrect; and that the trial court's method for determining the number of jurors denied the plaintiff equal protection and due process under the law. Although we think the magistrate judge who presided over this trial made several errors, none of them substantially affected plaintiff's rights or prejudiced the jury's verdict. Therefore, the magistrate judge's denial of plaintiff's motion for a new trial will be affirmed.

I.

The parties and their counsel are very familiar with the facts of the case and the procedural details that underlie the assignments of error. Therefore, there is no need to reiterate them in this unpublished opinion.

We observe, however, as a preliminary matter that there are three standards of review applicable to this appeal: de novo as to rulings of law, Miller v. Field, 35 F.3d 1088, 1090 (6th Cir. 1994), plain error as to evidentiary admissions and exclusions that were not the subject of contemporaneous

objection, Fed. R. Evid. 103(a) and (d), and abuse of discretion as to those rulings in which the magistrate judge was entitled to weigh multiple factors in making his determination, United States v. Levy, 904 F.2d 1026, 1029-30 (6th Cir. 1990). In addition, although harmless error is not a standard of review in the traditional sense, it is the criterion against which we test trial errors for unfair prejudice. See Fed. R. Civ. P. 61.

In a plain-error analysis, the affected party must show there was an error that is "clear and obvious under current law, and this error prejudicially affected the outcome of the trial. Even then, a court of appeals should exercise its discretion to reverse only when the result is a miscarriage of justice." United States v. Rodgers, 109 F.3d 1138, 1145 (6th Cir. 1997) (citations omitted). "Plain errors are limited to those harmful ones that are so rank that they should have been apparent to the trial judge without objection, or that strike at the fundamental fairness, honesty, or public reputation of the trial." United States v. Causey, 834 F.2d 1277, 1281 (6th Cir. 1987).

"'Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.'" Bowling v. Pfizer, Inc.,102 F.3d 777,780 (6th Cir. 1996) (quoting Logan v. Dayton Hudson Corp., 865 F.2d 789, 790 (6th Cir. 1989)). Harmless error is one that "does not affect the substantial rights of the parties." Fed. R. Civ. P. 61.

II.

A.

The plaintiff's first assignment of error is that she was denied a fair trial because of improper comments by defendants' counsel both in their opening and closing statements to the jury.

We have no doubt that several of the comments by defense counsel were improper. First, the attorneys personally vouched for the veracity of their clients' case and against the validity of Barbara Gleason's; they engaged in personal attacks on plaintiff's counsel; they insinuated that plaintiff's experts had fabricated their testimony; and they argued evidence which was not in the record. Second, these comments were made frequently during closing arguments. Third, many of the comments were crucial to the central issue before the jury, which was whose experts were more credible. Fourth, since Barbara Gleason offered sufficient evidence from which to conclude that her husband's death could have been prevented through different prophylactic measures, the case was close and could have been affected by defense counsel's improper conduct. Fifth, the no-cause verdicts are consistent with jury prejudice.

On the other hand, the trial court's continuing instructions and the plaintiff's failure to object to most of the matters of which she now complains mitigates the effect of defense counsel's statements. The court instructed the jury 1) to disregard any argument by the attorneys as to why any unnamed expert did not testify, 2) that the statements and

arguments of counsel were not evidence, and 3) to use their own recollection of the evidence where it conflicted with the attorneys' arguments. Most importantly, the plaintiff objected only once to any of defense counsel's inappropriate arguments, and that objection was to defense counsels benign reference to an expert-finding service, concerning whose activities there was evidence in the record. While plaintiff is correct that repeatedly objecting during defense counsel's argument could aggravate the jurors, plaintiff's counsel failed even to ask for a sidebar conference in order to draw the court's attention to opposing counsel's improper argument, or to ask the court to caution defense counsel, out of the jurors' hearing, to desist from further impermissible statements. Instead, save for one objection-and that one meritless-counsel for plaintiff did nothing.

This court has held that "[t]he determination of the extent of permissible comment and argument by counsel rests primarily in the judicial discretion of the lower court." Twatchman v. Connelly, 106 F.2d 501,509 (6th Cir. 1939).

> Indeed, whether misconduct in a trial of a cause of action is of such a nature that a fair or impartial verdict cannot be reached is in the first instance for the trial court's determination. The trial court is, of necessity, clothed with a great deal of discretion in determining whether an objectionable question is so prejudicial as to require a retrial . . . [.] The trial court is in a far better position to measure the effect of an improper question on the jury than an appellate court which reviews

> only the cold record. It is for this reason that this Court has declared that the power to set aside verdict [sic] for misconduct of counsel should be sparingly exercised on appeal . . . .
>
> In determining whether there is a reasonable probability that the verdict of a jury has been influenced by improper conduct, warranting that the verdict be set aside, a court must examine, on a case-by-case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e, g. whether it is a close case), and the verdict itself.

City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980) (internal quotation marks and citations omitted).

Plaintiff's failure to object precludes our review of her assignment of error under any standard other than plain error. Thus, even though it was probably "clear and obvious under current law" that defendants should not have been allowed to make some of the statements complained of, plaintiff's failure to object requires her also to show that the improper argument prejudicially affected the outcome of the trial, resulting in a miscarriage of justice. On this one issue alone, plaintiff has not met her burden. The verdict is well supported by the evidence which included expert testimony that the defendants

met the relevant standards of care. In light of plaintiffs failure to object to the defense counsel's improper comments and the abundance of evidence that the defendants were not liable for William Gleason's injuries and death, we decline to set aside the jury's verdict and order a new trial.

B.

Next, plaintiff points to six instances in which the magistrate judge allegedly erred in defendants' favor in admitting or excluding evidence. While we think the magistrate judge erred with regard to at least three of the challenged rulings, we are confident that, even taken collectively, these errors did not prejudice plaintiff's case. As we have many times observed, the parties are not entitled to a perfect or error-free trial; they are entitled to one that is fair-if imperfect-and results in a verdict supported by the properly admitted evidence. This, we think, was such a trial. The trial court's errors did not strike at the heart of plaintiffs theory of her case, and it cannot be said that correct rulings would have in any respect altered the jury's verdict.

C.

As for plaintiff's assignment of error regarding the jury instruction on intervening cause, obviously, such an argument is irrelevant. The jury found that none of the defendants' professional conduct had fallen below the appropriate standard of care in the first place; therefore, even if the instruction was erroneous, a correct instruction would have made no difference in the outcome of the trial, because the jury did not, nor did it need to, consider causation.

D.

Plaintiff's negligent infliction of emotional distress claim is grounded in an alleged violation of Ohio Revised Code § 2108.01 which regulates anatomical gifts of human bodies or body parts. Section 2108.08 provides:

> A person who in good faith acts, or attempts to act, in accordance with sections 2108.01 to 2108.12 of the Revised Code.. , is not liable for damages in any civil action ....

Ohio Rev. Code § 2108.08. Barbara Gleason contends that defendant Deaconess Hospital is not entitled to the benefit of this good-faith defense because Deaconess allegedly did not comply with the statute's other terms. Specifically, section 2108.04 requires that an anatomical gift "be made in one of the following ways: . .. (3) By a telephone call in which two persons receive the message and one of them prepares written documentation of the message, or by a telephone call that is recorded mechanically or electronically." Ohio Rev. Code § 2108.04 (emphasis added).

Barbara Gleason contends that, because the nurses who spoke with her did so consecutively, instead of simultaneously, they did not get the message as purportedly required by the statute. That is, they each got a message, but not necessarily the same one. However, plaintiff's reading does not appear to be warranted either by the plain meaning or the spirit of the statute. Two nurses made one phone call in which one nurse spoke to Barbara Gleason and then passed the phone to the second nurse, who Deaconess contends

confirmed the information recorded by the first. Both nurses spoke with Barbara Gleason, and one documented the conversation in writing. If the message had differed between nurse one and nurse two, then they probably would not have been acting in good faith if they had proceeded. The issue of good faith should have been, and was, given to the jury to decide. There was no error.

E.

Plaintiffs argument that her constitutional rights were violated by the court impaneling nine jurors and allowing each to participate in the verdict is equally meritless. Plaintiff now objects to the local practice followed by the magistrate judge of selecting six jurors plus one alternate for every week the trial was expected to last. Of the nine selected, none was specifically designated as an alternate, and none was dismissed during the course of the trial. Thus, all nine deliberated and returned a unanimous verdict. Plaintiff claims that she was forced to convince more people in a three-week trial than in a two-day trial, violating her right to equal protection. She also claims that not knowing how many jurors she would have to eventually convince violated due process.

Not only is the sole case cited for this proposition inapposite, plaintiff's position cannot logically be sustained. First, there would certainly be a rational basis for distinguishing between a two-day trial and a three-week trial in terms of the potential number of jurors who would need to be excused. Second, there is nothing fundamentally unfair about having to potentially convince six, seven, eight, or nine

jurors, when the result of convincing only the first six is not a defense verdict, but a mistrial. Certainly, the plaintiff bears the burden of proof as to all jurors. But there is no way of knowing, in a particular case or even on average, whether the last three jurors are going to be more or less sympathetic than the first six. And, as the Supreme Court has noted, increasing the number of jurors increases the reliability of verdicts. See Ballew v. Georgia, 435 U.S. 223, 232-39 (1978).

F.

Because plaintiff's assignments of error fail, we need not consider the merits of defendant Dr. Jeff Winholt's and defendant Deaconess Hospitals argument that they should have been granted judgment as a matter of law by the trial court. Resolution of the above issues in favor of all defendants renders Dr. Winholt's and Deaconess Hospitals cross-appeal moot.

III.

For the foregoing reasons, the trial court's denial of plaintiff's motion for a new trial is hereby **AFFIRMED**.

APPENDIX B

Nos: 96-3194: 96-3196: 96-3197

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed: October 20, 1997

BARBARA GLEASON, AS Executrix of the Estate of William C. Gleason, Deceased, and Individually
Plaintiff-Appellant Cross-Appellee

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.;
Defendants - Appellees

JEFF WINHOLT, M.D.; DEACONESS HOSPITAL;
Defendants Appellees Cross-Appellants

RHODA MCMAHON; CRAIG ROBERTS, M.D..
Defendants Appellees

MANDATE

Pursuant to the court's disposition that was filed 8/29/97 mandate for this case hereby issues today.

Gleason v. Noyes, et al.
Nos. 96-3194/96/97

A True Copy.

No costs taxed

Attest:

Filing Fee . . . . . .$
Printing . . . . . $

Deputy Clerk

Total . . . . . $

APPENDIX C

Nos. 96-3194/3196/3197

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
October 9, 1997
Leonard Green, Clerk

BARBARA GLEASON, AS EXECUTRIX OF THE ESTATE OF WILLIAM C. GLEASON, DECEASED, AND INDIVIDUALLY,	)	**ORDER**
Plaintiff-Appellant/Cross-Appellee,	)	
v.	)	
FRANK R. NOYES, M.D., ET AL.,	)	
Defendants-Appellees,	)	
JEFF WINHOLT, M.D.; DEACONESS HOSPITAL,	)	
Defendants-Appellees/ Cross-Appellants.	)	

BEFORE: MARTIN, Chief Judge; RYAN and BATCHELDER, Circuit Judges.

Gleason v. Noyes, et al.
Nos. 96-3194/96/97

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re:	:	
		Case No. 96-108
Complaint against:	:	
		Findings of Fact,
Philip J. Marsick,	:	**Conclusions of Law, And**
Attorney Registration		**Recommendation of The**
#0018685	:	**Board of Commissioners On**
Respondent,		**Grievances And Discipline**
	:	**Of The Supreme Court**
Cincinnati Bar		**of Ohio**
Association,	:	
Relator.		

This matter came on before the Panel on the Complaint of the Relator, Cincinnati Bar Association, and the Panel consisting of Sara Lioi, J. Thomas Hentetra and Judge P. Petzold who served as Chair of the Panel. None of the Panel resides in the appellate district in which the complaint arose or the Respondent resides, and none of the Panel was a member of the probable cause panel that reviewed the Complaint.

Present for the hearing were Robert F. Laufman, Sue.

Livensparger and Edwin J. Patterson, Counsel for the Cincinnati Bar. Present on behalf of the Respondent was James N. Perry, and Respondent was likewise present.

The record notes that the Respondent is 55 years of age and was duly admitted to the practice of law in 1972 and has maintained his office in Hamilton County since that time.

The Complaint consists of three counts and the third count was dismissed at the hearing. Count One related to the conduct of Respondent in falling to disclose a report and identification of a potential witness regarding an automobile accident which had occurred in Adams County, Ohio. The subsequent litigation was filed in the United States District Court for the Southern District of Ohio, Western Division. Count Two charges that the concealment of a witness statement during discovery in this lawsuit was false and fraudulent.

FINDINGS OF FACT

On or about May 15, 1988, James Abrahamsen parked his vehicle on the side of State Route 32 because he was suffering from fatigue and he went to sleep. A truck driven by Defendant's agent, Ronald Reagan, struck the vehicle owned by Abrahamsen, killing his wife and injuring him.

Subsequent to the incident, the Defendant Reagan was interviewed by a representative of his employer's insurance carrier, and a statement was given. Reagan also made a statement to a tow truck driver on the night of the accident that he had dozed off or fallen asleep immediately prior to the

accident occurring.

A suit was filed in May of 1990 within the applicable Statute of Limitations, and the carrier transmitted the authority to represent it and Defendant Reagan in the litigation to the law firm of which Respondent was a member. Included in that file was the witness statement taken by a representative of Respondent's insurance carrier client containing the "dozed off" admission.

Discovery proceedings ensued with the Plaintiff inquiring of the Defendant through interrogatories the names, addresses, and statements regarding any persons who witnessed the accident or were involved with the incident directly or indirectly. After some months of discussion and wrangling, the proceedings arrived at an impasse, but the Respondent replied to the counsel for the Plaintiff that there were two witness statements taken, one from a truck driver who had witnessed the Defendant Reagan at one and a half to two hours preceding the incident and another from Reagan himself. No mention was made of the known statement made by the tow truck driver that was a part of Respondent's file.

A request for the discovery of the Reagan statement was made by Plaintiffs not knowing that there were any other witness statements extant.

During the course of the discovery proceedings, the Defendant Reagan reiterated at deposition and in interviews the same version as was given on the accident report taken by the police at the scene and the report filed with the Ohio Department of Transportation. Reagan testified that the

accident occurred because a deer ran in front of the vehicle he was operating causing him to take emergency action and resulting in the death of the spouse of James Abrahamsen. During the deposition of Reagan, he first stated that he did not give a statement to anyone else other than the statements that were known. Later in that deposition Reagan stated that he was so shook up, he did not know what he said to anyone, when, or how. Respondent took no action to correct the impression that no statement had been made by Reagan to anyone else. Likewise, Reagan testified at trial to the same effect, and no corrective or informative statement was made by Respondent regarding Reagan's testimony that no other statements had been given to any person.

Negotiations followed, and ultimately the case was tried resulting in the verdict in favor of the Plaintiffs in an amount of $909,880.00, apportioning Defendant's responsibility at 70 percent and that of the Plaintiff, James Abrahamsen, at 30 percent as it related to the deceased spouse.

Respondent had filed a counter-claim for the Defendant against the Plaintiffs alleging contributory negligence, and as a result of the findings, a judgment of $121,000.00 was awarded in favor of the Defendant carrier and against the Plaintiff.

Plaintiff's carrier, Nationwide Mutual Insurance Company, had not been notified of the existence of this action and the potential claim (contained in the Counterclaim) and entered the proceeding under reservation of rights. Negotiations continued while the case was on appeal from the

United States District Court to the Sixth Circuit Court of Appeals on the issue of contribution. The trial court's order allowing full contribution was affirmed on appeal in Abrahamsen v. Trans-State Express, Inc., 24 F.3d 804 (6th. Cir. 1994).

Nationwide's exposure was to the extent of a $100,000 policy limit on James Abrahamson, and there was at least a $21,000 shortfall if the finding was not reversed. During the course of these proceedings, discussions were had with the parties on behalf of Nationwide, the Plaintiffs, and the Defendants (Respondent's client) concerning potential settlement of the counterclaim, Nationwide, appearing under reservation of rights, had not agreed to pay its full amount of insurance coverage, and the Defendant carrier was insistent upon recovering the full contribution share of the judgment to offset against the claim of the decedent's next of kin. During the course of negotiations, as discussions occurred between Plaintiff's counsel and Respondent, the statement of the tow truck driver was revealed (the order of disclosure remains unclear) by Respondent.

After the conversation took place with Plaintiff's counsel Stewart, Stewart advised Kinear, counsel for Nationwide, of the existence of this statement. This added to the problems Plaintiffs counsel faced, since some prejudice may have indeed inured to Nationwide by lack of knowledge of this witness who would testify contrary to the Defendant Keagan, and would have given strength to the argument that Nationwide had been prejudiced by the lack of proper and/or timely notification. At least one conversation took place with the lawyers for the Plaintiff concerning their potential

responsibilities and indeed malpractice responsibilities for not knowing of this particular statement and in failing to notify the carrier of the claim or potential claim against James Abrahamsen.

Plaintiffs counsel filed a motion under Fed. R. Civ. P. 60(b) with the trial court alleging violations under 60(b)(3) of fraud, misrepresentation, as well as the discovery material that was not provided.

The United States District Court for the Southern District of Ohio (Judge Spiegel) indicated that under the 60(b) provision the judgment against the Plaintiff James Abrahamsen should be modified and, the other judgment vacated. Because this did not tidy up all the procedural paperwork, it was necessary for the parties to commence a Rule 59 modification judgment proceeding, and accordingly the case proceeded to the Court of Appeals with a judgment in the full amount rendered in favor of Plaintiff without the effect of any contribution or contributory negligence being involved.

The Court. of Appeals in Abrahamsen v. Trans-State Express, Inc., 92 F. 3d 425(6th. Cir. 1996) made a determination that the activities of the Respondent were sufficiently egregious and in bad faith to cause the trial court to be sustained and pointed to the following:

> The District Court found that: "...had the jury had the benefit of the information withheld by the Defendants, they would not have apportioned any liability to Mr. Abrahamsen."

> "The District Court granted the relief because Reagan's testimony, in light of the new evidence, is incredible and because had the jury known of it, Defendants' attempt to shift blame would have been unreasonable." Id. At 430.

The Court of Appeals then stated it would be proper for sanctions based on discovery fraud or subornation of perjury to be determined against Respondent and/or Respondent's client at the District Court level and remanded the proceedings for further hearing consistent with its opinion.

At the District Court level, the Respondent was then represented personally by Leo Breslin, an attorney of some forty years experience in Cincinnati, on the issue of sanctions. After much negotiation, (see Exhibits G and H of Respondent) it was agreed that the full amount of the judgment against the Defendant Reagan and the trucking company would stand and that the fees of Nationwide's counsel would be paid and that no further sanctions would issue. Exhibit G is a negotiated statement of the stipulation which seems to be couched in language directly related to the disciplinary Complaint which had been filed by the Relator prior to the resolution of the matter in the District Court. Exhibit H is an Order then relating to Exhibit G with a statement from the United States District Judge that the matter is considered resolved and that no further sanctions be taken against the Respondent. The order was duly journalized.

Messrs. Mack and Stewart, attorneys for the Plaintiff, both testified that they did not pursue the tow truck driver as

a potential witness due to the fact the Respondent had indicated there were no such other statements and that the tow truck driver was not a witness to anything that was relevant. They felt this way because of Respondent's failure to disclose the statement contained in his file.

The Respondent, on cross-examination by Relator as well as on direct examination, stated that he made the judgment, which he now believes is erroneous, that he did not have to disclose the existence of the statement from the tow truck driver. However, Respondent did not hesitate to bring the matter to the attention of the Plaintiff's lawyers when the issue of contribution and potential personal liability against them was raised.

The Panel is intrigued by the thought that if Respondent didn't think he was doing anything wrong in the first instance, why did Respondent think he was doing anything right in the second? At any rate, this disclosure at long last fueled the Motion under Fed. R. Civ. P. 60(b)(3) that ultimately led to the recasting of the jury verdict in the case in District Court. Respondent explained, first of all, that it was a credibility issue upon which he made the call. He now states that province may not have been his, and he should be conducted himself appropriately within the Federal Rules of Civil Procedure, more particularly, Rule 26. The rationale of the Respondent in not pursuing the statement or indeed considering it of material significance is that his position had been one of establishing a defense of contributory negligence found by the accident reconstruction expert (whose report the Panel did not see) and other factors that were made available to him in the course of the investigation (again, factors we did

not have the privilege of viewing.).

The file and correspondence between the Respondent and the insurance carrier's representative cast significant doubt on the Respondent's position in that regard.

There was some testimony that this case would have settled in fairly short order had there not been the failure to disclose the existence of this witness statement, and if in fact the statement's existence had been made known at an earlier point. Settlement was a likely outcome inasmuch as the parties were admittedly working on a case valued in excess of $500,000 (Plaintiffs demanding policy limits of one million), and they were less than $?5,000 apart when negotiations terminated.

The Respondent further stated that he had been subject to enough sanction and punishment as is suggested in Judge Spiegel's Order that was drafted by his counsel, Leo Breslin, and endorsed by all parties. The entry apparently was drawn to conclude the matter of the Plaintiff's case, the Nationwide Insurance Company matter, and all other sanctions and costs.

Respondent likewise, through counsel, has suggested that no state sanction could indeed be imposed as reciprocity would militate against any further sanction due to Judge Spiegel's finding that no sanction should be invoked. A reading of the District Court Rules regarding discipline of attorneys discloses that the judge shall conduct a hearing on such matters. The Panel notes with interest that no hearing was ever held, arid it is at this time that the first hearing concerning the complete nature of Respondent's conduct has

been disclosed by parties under Oath.

CONCLUSIONS OF LAW

The Panel finds by clear and convincing evidence that the Respondent has violated DR 7102(A)(3); DR 7-102(A)(7); DR 1-102(A)(4); DR 7-102(A)(5) and DR 7-109(A) as charged in Counts I and II of Relator's Complaint.

MITIGATION

Respondent by way of mitigation stated that he is 55 years of age, married, lives in Anderson Township in Hamilton County,. has a two child family, one daughter currently out of school and a son who has certain special conditions. He has been practicing with the same law rum since his graduation from Chase Law School and admission to the Bar in 1972 and has been a partner in that firm for many years. The law firm basically does litigation practice. Two letters were provided by Respondent concerning his integrity and those are Exhibits I and J. No live testimony was offered concerning Respondent.

The Panel is faced with very serious questions relating to discovery disputes. Lawyers are constantly faced with tough calls as to what is and what is not discoverable arid what is and what is not discloseable. This Panel must agree that this case presents a Gordian knot of discovery and ethical issues. Because the rules have not been clear and because the issue is clouded in the adversarial give and take of trial practice, we hasten to advise that the decision of this Panel is in no way a judgment that each and every discovery dispute

will rise to the level of an ethical violation. Respondent's rationalization and justifications for withholding the information do nothing to erase his continuing fraud and his subsequent conduct during settlement negotiations underscores the violations that the Panel found in Count 1 and Count 2 by clear and convincing evidence. The Panel finds that Relator's Motion for a directed verdict on Count 2 is now moot.

The Panel further holds that the Respondent's failure to disclose the issue in question both at the level of interrogatory discovery and thereafter by Reagan's answer at his deposition destroys any claim of credibility that he relies on. The utilization of this knowledge of that witness statement at a later point in the proceedings to affect the negotiations of a judgment to benefit his client goes beyond the pale. The Sixth Circuit Court of Appeals did not accept Respondent's arguments concerning his justification for his conduct nor do we. The Respondent was all too anxious to be willing to have this Panel accept his rationale that because of the legal gymnastics he went through, his conduct was justified.

There are appropriate procedures for disclosure, requests for protective orders, and other motions that Respondent could have made. It is not the attorney's judgment as to credibility (in this case, which was shaken somewhat by the Defendant's own statement) that should rule.

The first duty that every lawyer has from the day that the lawyer's oath is taken until the end of practice in that appellate court not of this earth is that duty as an officer of the court, and it is paramount. Both the Respondent and Mr.

Breslin, who zealously attempted to protect the interests of the Respondent, speak to that.

We note here the repeated rationalization put forth to justify the Respondent's failure to disclose the witness statement involving the establishment of an elaborate defense that turned on the Plaintiff's contributory negligence After all the details were disclosed, the Sixth Circuit Court didn't think very much of that particular rationale, and the Panel does not favor it either. If the defense of contributory negligence was so meritorius and so strong, disclosure of this witness statement would have made little, if any, difference regarding the conduct of Plaintiff. The statement of the tow truck driver related only to the conduct of the Defendant driver.

This tendency toward justification and rationalization, if not downright evasiveness, troubles the Panel. Now that all has been said and done and the Respondent is sorry for his disclosure error, we note that others have suffered. Most importantly, the justice system suffered. Respondent stated his word and his relationship with others in the profession meant a great deal to him. From this day forward, the Panel only hopes that the Respondent will put those thoughts into more complete practice than exhibited here. While this conduct may be an isolated incident, the reasons given by the Respondent indicates a tendency not uncommon in practice today. Lawyers must rise above "play-by-the-rules-as-long-as-they-are-fair-to-me." The Panel will not condone, agree with, or affirm the actions of Respondent and accepts even less so his reasons therefore. We find his conduct to be a violation of the Disciplinary Rules and recommend a public reprimand.

RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on October 10, 1997. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. It found the Respondent's conduct an abuse of the justice system arid a fraud on the parties to the litigation, the court and the public. Such reprehensible conduct during litigation cannot be excused or condoned and is deserving of an actual suspension from the practice of law. Accordingly the Board by unanimous vote recommends that the Respondent, Philip J. Marsick, be suspended from the practice of law in the State of Ohio for six months. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the Order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

/s/_____
Jonathan W. Marshall, Secretary
Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

THE SUPREME COURT OF OHIO

CINCINNATI BAR ASSN.	:	**1997 TERM CASE NO. 97-2257**
Relator	:	
v.	:	
PHILIP J. MARSICK, a.k.a. PHILIP JOHN MARSICK, JR,	:	**RESPONDENT'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE**
Respondent.	:	

* * * * *

Respondent hereby gives notice to the Court that the Respondent accepts the recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court and respectfully requests the Court to confirm the Findings of Fact and Conclusions and enter the recommended disciplinary order.

The Respondent will not file objections to the Findings of Fact and Recommendations of the Board.

/s/_____
JAMES N. PERRY (0001277)
Attorney for Respondent
601 Main St. 3rd Floor
Cincinnati, Ohio 45202

PROOF OF SERVICE

Copies of the foregoing "Respondent's Response to the Courts Order to Show Cause" was served by ordinary U.S. Mail on the following this 24th day of November, 1997:

(1) Robert F. Laufman
Attorney at Law
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202

(2) Sue Livensparger
Attorney at Law
Legal Aid Society
901 Elm Street
Cincinnati, Ohio 45202

(3) Jonathan W. Marshall
Secretary
Board of Commissioners on
Grievances & Discipline
of the Supreme Court of Ohio
41 South High St., Ste. 3370
Columbus, Ohio 43215-8481

/s/_____
JAMES N. PERRY (0001277)
Attorney for Respondent

Supreme Court, U.S.
FILED
JAN 7 1998
OFFICE OF THE CLERK

No. 97-1164

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,
Petitioner,

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; JEFF WINHOLT, M.D.; DEACONESS HOSPITAL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JOHN H. METZ
COUNSEL OF RECORD
ATTORNEY AT LAW
441 VINE STREET
SUITE 4400
CAREW TOWER
CINCINNATI, OHIO 45202-3016
(513) 241-8844
ATTORNEY FOR PETITIONER

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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APPENDIX E

PORTION OF TRIAL TRANSCRIPT RAISING EDE ISSUE AND THE MAGISTRATE'S DENIAL [T.p.2342-2345]

* * * * *

[2342]

MR. METZ: Just one thing that's still sort of hanging, Your Honor, was during the trial that issue about the mutual insurance companies, and I think the witnesses were supposed to leave information with the Court as to that. And I think I filed a memo on that.

THE COURT: What is your position now on that?

MR. METZ: Just that we don't forget about it, that I think I refrained from bringing it up before the jury until the Court would have an opportunity to make a decision on that. I think we had agreed that we would allow the Court to consider

[2343]

that, and if --

THE COURT: Did those witnesses have an ownership

interest in any of those insurance companies?

MR. METZ: I don't know about ownership, but the Ede case syllabus doesn't say ownership; it says mutuality of liability carriers. They didn't get into ownership. And that's my point, that the Ede case is what it is. It doesn't say that the physician has to be a mutual company or an owner, just mutuality of the liability carrier, and the syllabus is the law of Ohio, and certainly, if the Supreme Court wanted to limit it to mutual insurance companies only, it could have done so in the case because that was the facts from which the case came out. But that's not what made it into the syllabus. The syllabus is broader and says mutuality is the issue, and I guess that's my position. So I would ask that the jury be instructed as to that, as to that mutuality.

THE COURT: Mr. Lyon, do you oppose that?

MR. LYON: Yes, Your Honor. I think first --

THE COURT: Just a minute. Let me just ask you a question here. The only question I want to know the answer to is this. If you are satisfied that you don't have a reversible error situation in the case,

[2344]

my inclination is not to instruct the jury about insurance. Mr. Metz is representing this as a syllabus in an Ohio Supreme Court case.

MR. LYON: Your question to me is do I --

THE COURT: I know that strategically you don't want the jury to hear about insurance, but I want you to make sure that, if I was to rule in your favor and you prevailed in

this case, you wouldn't have to try it again because of this ruling.

MR. LYON: I'm not concerned about that, Your Honor. I do oppose it, and I don't believe that, just for the record, for Mr. Metz's sake, I was supposed to do this before. Dr. Kennealy is insured by Medical Protective of Ft. Wayne, Indiana, as is Dr. Noyes, as is Dr. McClellan for that matter, but he was a subsequent treater, may not fall into this. I don't believe that that case has anything to do with malpractice insurance policies, the type of which Medical Protective issues and these gentlemen have, primarily because I think the case had to do with a PIE Mutual Insurance Company wherein each physician did have a stake, small as it may be, but did have stakes and were mutual owners in the company. That's my view.

THE COURT: There is a statement from Dr.

[2345]

Miller that's been put into the record, won't go to the the jury. You're supposed to put in statements regarding anyone else. Just make sure that you do that so the record shows what the insurance is. And I'm going to deny the motion to instruct the jury on insurance, because I think it's far too prejudicial. Now, then, that takes us to Mr. Lyon's argument.

* * * * *

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Barbara Gleason, et al.	)	**JUDGMENT IN A**
	)	**CIVIL CASE**
v.	)	
	)	CASE NUMBER:
Dr. Frank R. Noyes, et al.	)	C-1-93-520

_____/

Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the jury's verdict is in favor of all the defendants--

September 8, 1995

/s/_____
Kenneth J. Murphy, Clerk

APPENDIX G

PORTION OF PETITIONER'S MOTION FOR NEW TRIAL RAISING EDE ISSUE [P.65-66 OF JOINT APPENDIX]

* * * * *

[65]

Ede v. Atrium South OB-GYN, Inc., (1994), 71 Ohio St.3d 124

In determining state law, the state's highest court are accorded the greatest weight by the federal court. In diversity cases, the federal courts must apply state law in accordance with the then controlling decision on the highest state court. (Vandenbark v. Owens-Illinois Glass Co., 311 US 538, 85 LEd 327, 61 S.Ct. 347; Grantham & Mann, Inc. V. American Safety Products, Inc., (1987, CA6 Tenn), 831 F.2d 596.

[66]

The plaintiff raised throughout the trial the issue of "commonality of insurance" between defendants and several of defense expert witnesses.[1] As the court may recall, prior to

[1] The Ohio Supreme Court in the recent decision of Ede v. Atrium South OB-GYN, Inc. (1994), 71 Ohio St.3d 124, held and its syllabus reads:

the close of the case this issue was addressed several times and the court specifically asked defense counsel if they wished to insist that this matter be kept from the jury, since the court was concerned as to whether or not such would be error. Defense counsel continued to demand that the jury should not be informed of this "commonality of interest" contrary to the Ohio Supreme Court's mandate in Ede v. Atrium South OB-GYN. Inc., (1994), 71 Ohio St.3d 124. Consequently the court did not permit this information to be given to the jury.

This in and of itself may not have been so prejudicial; however, given the defense primary tactic of attacking the credentials of the expert witnesses of plaintiffs; permitting only the defendants' experts' C.V.'s to go to the jury and the jury not being aware the testimony from the majority of the defense medical experts were from those with a 'commonality of insurance interest' with the defendants does cumulatively arises to an added error which created prejudice. Although violation of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a case will be reversed where the cumulative effect of the errors deprive a party of the constitutional right to a fair trial. (State v. DeMarco, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987)).

* * * * *

"In a medical malpractice action, evidence of a commonality of insurance interests between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause. (Evid.R. 411, applied.)"

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Barbara Gleason,	)	
Plaintiff	)	**ORDER**
	)	
v.	)	Case No.
	)	C-1-93-520
Frank Noyes, M.D., et al.,	)	
Defendants	)	
_____/		

On September 8, 1995, a jury found in favor of defendants on plaintiff's claims of malpractice, inadequate informed consent and negligent infliction of emotional distress arising from the death of plaintiffs husband, William Gleason, during his 1992 admission to Deaconess Hospital for the manipulation of his knee. This matter is before the court on plaintiffs motions for judgment notwithstanding the verdict and for a new trial and defendants' memoranda in opposition. (Docs. 70, 71, 72, 75).

A court can consider a motion for a judgment notwithstanding the verdict, or as it is now called a motion for a judgment as a matter of law, only if the moving party has previously moved for a directed verdict at the close of all the evidence. Fed. R. Civ. P. 50; *Jackson v. City of Cookeville,*

31 F.3d 1354, 1357-1358 (6th Cir. 1994) (citing *Portage H v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1522 (6th Cir. 1990)). When a party has failed to make the pre-verdict motion, the court may not rule on such a motion for judgment made after the verdict. Id.

Plaintiff did not make a motion for judgment as a matter of law at the close of the evidence after defendants rested. *(See* Doc. 60). Therefore, this Court may not consider plaintiffs motion for judgment notwithstanding the verdict.

The motion for a new trial is based primarily on the following grounds: 1) the verdict was against the weight of the evidence; 2) several asserted erroneous evidentiary rulings pertaining to the testimony of expert witnesses; and 3) defense attorney misconduct.

In a diversity case, the question of whether a new trial should be ordered is a .federal procedural question decided by reference to federal law. *Toth v. Yoder Co.*, 749 F.2d 1190, 1197 (6th Cir. 1984). According to federal law, the granting or denying of a new trial is purely within the discretion of the trial court. *Logan v. Dayton Hudson Corp.*, 865 F. 2d 789, 790 (6th Cir. 1989).

In ruling on a motion for a new trial challenging the weight of the evidence, the court must compare the opposing proofs, weigh the evidence, and set aside the verdict only if it determines that the verdict is against the clear weight of the evidence. *United States v. L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993) (citing *Woodbridge v. Dahlberg*, 954 F.2d 1231, 1234 (6th Cir. 1992)). "The motion should be denied if the verdict is one which could reasonably have been reached, and 'the verdict is not unreasonable simply because

different inferences and conclusions could have been drawn or because other results are more reasonable.'" *Id. The* court may not assess witness credibility, a function solely for the jury. *Cooke,* 991 F.2d at 343.

Plaintiff essentially argues that defendants' witnesses were not credible. This Court may not remake the jury's credibility determinations. There was substantial evidence from which the jury could reasonably have reached a verdict for the defendants.

An error in either the admission or exclusion of evidence may not be grounds for granting a new trial unless refusal to take such action is 'inconsistent with substantial justice," Fed. R. Civ. P. 61; *TCP Industries, Inc., v. Uniroyal, Inc.,* 661 F.2d 542, 550 (6th Cir. 1981); or in the case of excluded evidence, the evidence would have caused a different outcome, *Nida v. Plant Protection Ass'n Nat'l,* 7 F.3d 522, 527 (6th Cir. 1993). This Court's rulings limiting the testimony of the expert witnesses in this case were intended, in part, to address issues of unfair surprise to the parties. Because of the abundance of expert testimony in this case from all parties, these limitations did not affect the substantial rights of the plaintiff nor would their absence have made a difference in the outcome of the trial.

Plaintiff's complaint that she was prejudiced by the lengthy curricula vitae of defendants' expert witnesses, contrary to District Judge Rubin's trial procedures, is specious. On February 6, 1995, this case was referred to the Magistrate Judge for final disposition by consent of the parties. The Magistrate Judge met with the parties on three separate occasions substantially in advance of trial (Docs. 22, 27, 30), and at no time did this Court suggest that District Judge Rubin's trial rules would be in effect. The parties were

told that the Magistrate Judge's procedures would be followed at trial. Moreover, at plaintiff's request this Court altered one of Judge Rubin's rulings by allowing plaintiff to call an additional expert witness. Although plaintiff contends that she believed that she. was bound by Judge Rubin's trial procedures to limit experts' curricula vitae to one page, plaintiff did not even .attempt to offer longer curricula vitae. No ruling of this Court prohibited plaintiff from providing the jury with additional information concerning her expert's qualifications, and plaintiff's failure to do so was her own choice.

Only attorney conduct that results in prejudice may serve as a basis for a new trial, *Clarksville-Montgomery County School System v. United States Gypsum Co.*, 925 F.2d 993, 1002 (6th Cir. 1991) (citing *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980)), and the burden of showing harmful prejudice rests on the moving party, *Clarksville,* 925 F.2d at 1002. The Court must assess whether there is a reasonable probability that counsel's misconduct prevented the jury from reaching a fair or impartial verdict by examining the totality of the circumstances, including the nature of the comment, the court's and the parties' reactions, and the strength of the case. *Davis v. Mutual Life Ins. Co. of New York,* 6 F.3d 367, 387 (6th Cir. 1993) (citing *City of Cleveland,* 624 F. 2d at 756), *cert. denied,* 114 S. Ct. 1298 (1994).

Plaintiffs counsel failed to object to most, if not all, of the incidents now identified as attorney misconduct. Nevertheless, in some instances the Court instructed the jury to disregard counsel's comments. For example, one defense attorney urged the jury at three separate points to "stand beside" his client as he treated and cared for the plaintiff. Despite plaintiffs failure to object, the Court admonished the

jury not to associate itself or put itself in the place of any party but rather to view the case objectively, as judges not advocates.

Although one defendant's attorney inappropriately personally attacked plaintiff's counsel, plaintiff's counsel did not object and responded in kind. At the conclusion of the parties' arguments, the Court noted that it should now be clear why this phase of the trial was called argument, and directed the jury to disregard reference to matters not in evidence. The jury charge again generally instructed the jury that "statements, questions and arguments of counsel are not evidence."

Given plaintiffs general failure to object to defense counsel's conduct, the Court's curative instructions to the jury, the fact that plaintiff's counsel also engaged in similar conduct, and the substantial evidence presented by defendants, we conclude that defense attorneys' conduct did not unduly influence the verdict.

This Court has carefully examined all the other issues raised in plaintiff's motion and found them to be insufficient to warrant a new trial. Accordingly, plaintiffs motions for a judgment notwithstanding the verdict and for a new trial are DENIED.

Date: 12/26/95

/s/_____
Robert A. Steinbert
United States Magistrate Judge

Respectfully submitted,

/s/_____

John H. Metz
Counsel of Record

Attorney at Law
441 Vine Street
Suite 4400
Carew Tower
Cincinnati, Ohio 45202-3016
(513) 241-8844

Attorney for Petitioner

OPPOSITION

BRIEF

(3)

Supreme Court, U.S.
FILED
FEB 13 1998
CLERK

No. 97-1164

In The

Supreme Court of the United States

October Term, 1997

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,

Petitioner,

vs.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; JEFF WINHOLD, M.D.; DEACONESS HOSPITAL,

Respondents.

On Petition for Writ of Certiorari to the United States States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DEACONESS HOSPITAL

MARK J. HULLER
Counsel of Record
BERLON & TIMMEL
Attorneys for Respondent Deaconess Hospital
P.O. Box 145496
Cincinnati, Ohio 45250-5496
(513) 870-2287

144672

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a single evidentiary ruling in a four week trial, which was not directly related to the merits of the case and which the court of appeals determined did not prejudice petitioner's case, warrants review by the Supreme Court of the United States.

2. Whether allegedly inappropriate remarks made by counsel in closing argument, to which petitioner's counsel did not object, and which were not shown to have affected the outcome of the trial, warrant review by the Supreme Court of the United States.

3. Whether petitioner's contention that Federal Rule of Civil Procedure 48 is unconstitutional states a compelling reason for Supreme Court review.

4. Whether it is proper for the petitioner to attempt to raise the issue of the constitutionality of a state statute in the United States Supreme Court when the issue was neither raised nor addressed in the trial court or court of appeals.

DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Supreme Court Rule 29.6, respondent, Deaconess Hospital, makes the following disclosures:

1. Deaconess Hospital is a not-for-profit corporation.

2. The parent company of Deaconess Hospital is The Deaconess Associations, Inc., which is also a not-for-profit corporation.

3. There are no nonwholly owned subsidiaries of Deaconess Hospital.

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A. Order denying plaintiff's motions for a judgment notwithstanding the verdict and for a new trial, United States District Court, Southern District of Ohio, Western Division, Case No.: C-1-93-520 (January 3, 1996) (Appended hereto at 1a-5a).

B. Opinion affirming trial court's denial of plaintiff's motion for a new trial, United States Court of Appeals for the Sixth Circuit, Case Nos.: 96-3194/96/97 (August 29, 1997) (Appended hereto at 6a-14a).

STATEMENT OF THE CASE

Respondents, Frank R. Noyes, M.D., Cincinnati Sportsmedicine & Orthopaedic Center, Inc., Deaconess Hospital, and Jeff Winholt, M.D., were defendants in a medical malpractice, wrongful death suit brought by the petitioner, Barbara Gleason, individually, and as the Executrix of the Estate of William C. Gleason. A four week jury trial in the United States District Court for the Southern District of Ohio, Western Division resulted in a unanimous verdict being rendered by a nine person jury in favor of all defendants. (R. 68). Petitioner then filed a dual "Motion for New Trial/JNOV." (R. 70). Both motions were denied in a four page written Order of the trial court. (R. 76) (Appendix at 1a-5a, hereinafter "App. 00a-00a").

Petitioner then appealed the jury verdict to the United States Court of Appeals for the Sixth Circuit which unanimously affirmed the verdict of the trial court. Next, the petitioner chose to petition the court of appeals for a rehearing en banc which was denied. The petitioner also sought a rehearing from the original panel of appellate judges who heard the case, which was denied on the basis that all issues raised in the petition for

rehearing were fully considered in the original submission to the court of appeals.

In addition to making allegations of medical malpractice, petitioner asserted a cause of action against Deaconess Hospital under the common law of Ohio for negligent infliction of emotional distress. Petitioner alleged Deaconess Hospital violated sections of the Ohio Revised Code which regulate the donation of anatomical gifts. Following Mr. Gleason's death, the Patient Care Supervisor of Deaconess Hospital was required to contact the next-of-kin of Mr. Gleason to determine whether they wished to make an anatomical donation. (T. p. 2020). Deaconess Hospital nurses contacted Ms. Gleason by telephone from the hospital in Cincinnati, Ohio, at her home in Michigan, where she stated her wish to donate "anything that could be used." (T. p. 2007). The telephone consent for the anatomical gift was witnessed by two separate Deaconess Hospital registered nurses who filled out written forms regarding the consent as they spoke to Mr. Gleason on the telephone. (T. pp. 2007, 2034-2035). Certain body parts were then procured by an outside agency not affiliated with the Deaconess Hospital. (T. pp. 2210, 2211). Ms. Gleason now states she placed a restriction on the donation. The above testimony of the nurses and hospital documentation state otherwise. (Joint Trial Exhibits 4009, 4010). The jury made a factual determination that the hospital complied with Ohio law in the manner in which it accepted the anatomical donation.

The petitioner asserted an assignment of error in the court of appeals contending the trial court improperly instructed the jury on Ohio law relating to anatomical donations. The Sixth Circuit ruled that the jury received proper instructions on this issue from the trial judge. (App. 12a-13a). Petitioner now, for the first time, argues to this Court that it should review the constitutionality of the Ohio statute which sets forth the procedure for accepting anatomical gifts.

REASONS FOR DENYING THE WRIT

There is no compelling reason for the United States Supreme Court to review the decisions of the two lower courts in the present case. Similar arguments to those made in the Petition for Writ of Certiorari were heard by the trial court in plaintiff's "Motion for a New Trial/JNOV" and the appeal to the United States Sixth Circuit Court of Appeals. Both courts concluded that while there may have been some error during the course of this intensely litigated four week trial, the petitioner received a fair trial and there was an abundance of evidence in support of the verdict the jury reached.

The essence of petitioner's argument turns on the facts of the case at bar and the arguments made by counsel, which are matters of interest only to the parties hereto. Petitioner is asking this Court to conduct a third review of the lengthy trial record in this case to see if it can find what two previous courts have been unable to find — proof that petitioner received an unfair trial. As was succinctly stated by the court of appeals following its review of the voluminous record in the present case:

> As we have many times observed, the parties are not entitled to a perfect or error-free trial; they are entitled to one that is fair — if imperfect — and results in a verdict supported by the properly admitted evidence. This, we think, was such a trial.

(App. 11a).

It is well settled that fact canvassing is not a task to be served by a grant of a writ of certiorari. *United States v. Johnson*, 268 U.S. 220, 227 (1925). "We do not grant a certiorari to review evidence and to discuss specific facts." *Id.*

I.

A SINGLE EVIDENTIARY RULING IN A FOUR WEEK TRIAL WHICH WAS NOT DIRECTLY RELATED TO THE MERITS OF THE CASE AND WHICH THE COURT OF APPEALS DETERMINED DID NOT PREJUDICE PETITIONER'S CASE DOES NOT WARRANT REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

Petitioner's contention that the trial court should have admitted evidence that one of the respondents had the same professional liability insurer as two of the numerous expert witnesses who testified in the present case is an issue that has no bearing on respondents Deaconess Hospital and Jeff Winholt, M.D. The respondent whom petitioner contends had a commonality of insurance interest with two expert witnesses is Frank Noyes, M.D. Since the question of admissibility of the identity of insurance carriers is not relevant at all to the claims made by the petitioner against Deaconess Hospital, discussion of this issue herein will be very brief.

It is well established that in diversity cases dealing with procedural matters such as admissibility, the Federal Rules of Evidence apply. *Grenada Steel Indus., Inc. v. Alabama Oxygen, Inc.*, 695 F.2d 883 (5th Cir. 1983); *McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir. 1985). Even in a diversity case in which the district court would otherwise be required to apply the law of the state in which it is sitting, the Federal Rules of Evidence are controlling over conflicting state laws unless the particular rule in question transgresses either the standard set forth in the Enabling Act, 20 U.S.C. § 2072, or the Constitution. *Hanna v. Plummer*, 380 U.S. 460, 469-474, 85 S. Ct. 1136, 1143-1145 (1965).

As indicated in the brief of petitioner, the trial court refused to admit evidence of Dr. Noyes' insurance carrier based on the dictates of Federal Rule of Evidence 403. Since Rule 403 does not transgress the standards set forth in the Enabling Act or the Constitution, it is controlling, and the trial court properly applied it to exclude evidence of insurance. Moreover, the subject evidentiary issue is an extremely narrow one, applicable only to this case and only one of the multiple respondents in the case. As the court of appeals noted, any evidentiary errors made by the trial court "did not strike at the heart of plaintiff's theory of her case, and it cannot be said that correct rulings would have in any respect altered the jury's verdict." (App. 11a). The subject evidentiary question presented by the petitioner certainly does not constitute a compelling issue of public interest calling for Supreme Court review.

II.

REMARKS MADE IN CLOSING ARGUMENT TO WHICH PETITIONER DID NOT OBJECT AND WHICH WERE NOT SHOWN TO HAVE AFFECTED THE OUTCOME OF THE TRIAL DO NOT WARRANT REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

A. Counsel for Deaconess Hospital made no argument calculated to appeal to the passion or prejudice of jurors.

Counsel for Deaconess does not claim to be a perfect trial lawyer and in a trial the length of this one, it would not be surprising to find technical errors committed at some point in the proceedings by each of the four trial attorneys who were plying their trade in the courtroom. This was an intensely litigated case; however, no mistake by counsel for Deaconess, if indeed there were any, was calculated. Certainly, there was

no attorney conduct by counsel for Deaconess which was designed to inflame passion and prejudice on the part of the jury, nor did any conduct of Deaconess' counsel have such affect.

Before counsel for Deaconess addressed the jury in closing argument, petitioner's counsel told the jury a conspiracy had been entered into by the respondents. In closing argument, petitioner's counsel accused the hospital physical therapist of agreeing to change her testimony upon the suggestion of defense lawyers. (T. p. 2526). Petitioner's counsel further accused Deaconess Hospital of not performing a thorough enough autopsy because the pathologist was afraid of what he would find, (T. p. 2537), even though there was no testimony during trial to support such scurrilous allegations. It was argued by petitioner that Mr. Gleason died because of a lack of protection from the doctors and hospital nurses. (T. p. 2542).

The vicious attacks against the respondents in closing argument by petitioner's counsel continued when, after implying Dr. Noyes, an internationally known and respected orthopedic surgeon, was a "killer" (T. p. 2524), petitioner's counsel stated that Deaconess Hospital was worse than a street fighter.

> . . . Even street fighters don't kick you when you're down. But at this time in our life, at one of the worst moments in our life, the hospital gets into this anatomical gifts . . .

(T. p. 2544).

When it was the turn of counsel for Deaconess to address the jury, no such underhanded remarks were made about petitioner. Assuredly, argument was spirited, but defense counsel does have rights equal to petitioner's counsel when addressing

the jury in closing argument. In remarks to the jury, attorneys for both the plaintiff and defendants serve as advocates "and proper oratorical emphasis is denied neither." *Henderson v. United States*, 218 F.2d 14 (6th Cir. 1955).

> Final argument has traditionally been just that — argument — an opportunity for counsel to persuade, cajole or convince jurors. Plaintiff's counsel were not limited in any anecdotes they told . . . A defense counsel, in seeking to persuade the jury should be given same entitlement.

In re: Richardson-Merrell, Inc. v. Bendectin Prod. Liab. Litig., 624 F. Supp. 1212, 1226 (S.D. Ohio 1985), *aff'd*, 857 F.2d 290, *cert. denied*, 488 U.S. 1006, 109 S. Ct. 788 (1989).

As Justice Rehnquist has opined:

> [C]losing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify [attorney] misconduct, they do suggest that a court should not lightly infer that [counsel] intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-647, 94 S. Ct. 1868, 1873 (1974).

Petitioner's brief attempts to paint a picture of courtroom anarchy and rampant incivility by defense counsel. This is an entirely false picture. In the instant case, not only did the trial

judge address the issue of alleged defense attorney misconduct and dismiss it, (App. 5a), he went out of his way to compliment the attorneys on the presentation of their respective cases, stating on the record at the close of trial:

> While we are talking about the attorneys in the case, I would like to just comment that I feel that attorneys have done an excellent job in trying this case. They have demonstrated professional courtesy that we expect to see here in the Federal Court . . . Although the attorneys have vigorously presented their positions, they have been cordial and courteous to each other and its been a pleasure to have them try this case.

(T. p. 2486).

Finally, at the conclusion of the trial, after the jury was excused and while all counsel were still in the courtroom, the trial judge again complimented all the attorneys, informing the parties they could not have been represented any better than they were. (T. p. 2660).

B. In dealing with allegations of improper argument by counsel, the trial judge is afforded wide discretion.

It has been said that in reviewing allegations of alleged attorney misconduct, the trial judge is entrusted with wide discretion because he is in the best position to appraise the affect of the allegedly improper argument of counsel. *Reed v. Philadelphia, Bethlehem & New England Co.*, 939 F.2d 120 (3rd Cir. 1991); *VanSkike v. Union Pacific R. Co.*, 725 F.2d 146 (8th Cir. 1984). The general rule is that decisions of a trial judge based on the assessment of the prejudicial impact of allegedly improper argument of counsel is entitled to *great*

deference. Arizona v. Washington, 434 U.S. 497, 514, 98 S. Ct. 824, 835 (1978) (emphasis added). Whether or not gross prejudice has resulted from improper conduct of opposing counsel is a determination that "rests primarily in the judicial discretion of the trial court." *Davis v. Mutual Life Ins. Co. of N.W.*, 6 F.3d 367, 387 (6th Cir. 1993). Neither oratorical exaggeration nor provocative remarks in closing arguments should cause reversal of a jury verdict if a trial court has determined the arguments were not grossly prejudicial. *VanSkike v. Union Pacific R. Co.*, 725 F.2d 1146 (8th Cir. 1984). "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 242-243, 60 S. Ct. 811, 853.

The authority to grant a new trial based upon prejudice resulting from attorney misconduct "is confided almost entirely to the exercise of discretion on the part of the trial court." *Clarkesville Montgomery Co. Sch. Sys. v. United States Gypsum Co.*, 925 F.2d 993 (6th Cir. 1991). Absent an abuse of discretion, the trial court's denial of a motion for a new trial as a result of alleged attorney misconduct should not be disturbed. *Clarkesville Montgomery Co. Sch. Sys. v. United States Gypsum Co.*, 925 F.2d at 1003. In the case at bar, the trial judge reviewed plaintiff's post verdict allegations of misconduct by defense counsel and in its written opinion appended hereto concluded "defense attorneys conduct did not unduly influence the verdict." (App. 5a).

C. Petitioner did not object to the alleged improper argument.

Perhaps the most revealing aspect of petitioner's post verdict accusations of attorney misconduct is the fact that petitioner did not object at any time before receiving an adverse jury verdict

to these alleged improprieties which are now contended to be so grievous. The trial judge pointed out in ruling on petitioner's post trial motion, in which the petitioner's objected for the first time to certain remarks made during closing argument, that "[p]laintiff's counsel failed to object to most, if not all, of the incidents now identified as attorney misconduct." (App. 5a). Likewise, Judge Ryan of the Sixth Circuit Court of Appeals stated:

> [T]he plaintiff objected only once to any of defense counsel's inappropriate arguments, and that objection was to defense counsel's benign reference to an expert finding service, concerning whose activities there was evidence of record . . . [P]laintiff's counsel failed even to ask for a sidebar conference in order to draw the court's attention to opposing counsel's improper argument, or to ask the court to caution defense counsel out of the jurors hearing to desist from further impermissible statements. Instead, save for one objection — and that one meritless — counsel for plaintiff did nothing.

(App. 9a).

It is a telling fact that at the time these allegedly improper remarks were made, none of the professional participants in the trial, the trial judge, defense counsel, or plaintiff's counsel felt that any improper argument had been made. Deaconess denies it made any improper arguments to the jury. However, even if, *in arguendo*, there were objectionable mistakes made in closing argument by counsel for Deaconess, petitioner failed to preserve them for review.

Counsel "cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the

first time on the point that the comments to the jury were improper and prejudicial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238, 60 S. Ct. 811, 851 (1940).

> There is no doubt that, in the excitement of an argument, counsel do sometimes make statements which are not fully justified by the evidence. This is not such an error, however, as will necessarily vitiate the verdict or require a new trial. It is the duty of counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception.

Crumpton v. United States, 138 U.S. 361 (1891). The reason for the rule is to enable the trial court to deal with the matter. *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55 (8th Cir. 1947).

D. The jury verdict was supported by an abundance of evidence.

In the present case, both the trial and appellate courts performed the appropriate analysis of petitioner's accusations and reached the correct result. The court of appeals held that "plaintiff's failure to object requires her also to show that the improper argument prejudicially affected the outcome of the trial, resulting in a miscarriage of justice." (App. 11a). The appellate judges unanimously concluded plaintiff did not meet this burden, specifically holding that "[t]he verdict is well supported by the evidence" and that there was an "abundance of evidence that the defendants were not liable for William Gleason's injuries and death." (App. 11a).

Suffice it to say that the trial court was correct in ruling there was no undue prejudice to the parties resulting from the

closing arguments of counsel (App. A-4) and the court of appeals properly found petitioner received a "fair" trial, "supported by the properly admitted evidence." (App. 11a).

III.

PETITIONER'S CONTENTION THAT FEDERAL RULE OF CIVIL PROCEDURE 48 IS UNCONSTITUTIONAL DOES NOT STATE A COMPELLING REASON FOR UNITED STATES SUPREME COURT REVIEW.

A nine person jury was impaneled at the commencement of trial. The trial judge informed all counsel four weeks before trial that the local practice was to seat a jury of six plus one extra juror for each anticipated week of trial to guard against the potential of a mistrial should jurors become ill or otherwise indisposed during trial. (R. 83, p. 30). No party objected to this procedure at the time. (*Id.*)

The Seventh Amendment of the Constitution requires that a jury be comprised of "a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community." *Colgrove v. Battin*, 413 U.S. 49, 160 n.16, 93 S. Ct. 2448 (1973); *Hanson v. Parkside Surgery Ctr.*, 872 F.2d 745 (6th Cir. 1989). Fed. R. Civ. P. 48 did away with the practice of seating alternate jurors. It states in pertinent part that

> [t]he court shall seek a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict . . . No verdict shall be taken from a jury reduced in size to fewer than six members.

Fed. R. Civ. P. 48. The rule has been in effect since 1991 and no court has found it to be in violation of the Seventh Amendment.

While petitioner claims Rule 48 is unconstitutional, no authority is cited in support of this assertion. Federal rules regulating matters indisputably procedural or matters capable of classification as either substantive or procedural are "*a priori* constitutional." *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 5, n.3, 107 S. Ct. 967, 97 n.3 (1987). As Rule 48 regulates procedural matters (the number of jurors participating in the verdict), it is *a priori* constitutional. It has been said, if anything, juries of more than six persons increase the reliability of verdicts. *Hanson*, 872 F2d at 750, citing *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029 (1978).

As the Sixth Circuit properly noted in its Opinion below:

> [T]here is nothing fundamentally unfair about having to potentially convince six, seven, eight or nine jurors, when the result of convincing only the first six is not a defense verdict, but a mistrial. Certainly, the plaintiff bears the burden of proof as to all jurors. But there is no way of knowing, in a particular case or even on average, whether the last three jurors are going to be more or less sympathetic than the first six. And, as the Supreme Court has noted, increasing the number of jurors increases the reliability of verdicts. Citing, *Ballew, supra.*

(App. 14a).

Petitioner has failed to articulate any compelling reason for this Court to analyze the constitutionality of Rule 48. The rule is *a priori* constitutional and petitioner has put forth no logical

argument in support of the contention that it is generally unfair to plaintiffs.

IV.

PETITIONER'S ASSERTION THAT THE OHIO STATUTE ON ANATOMICAL DONATIONS IS UNCONSTITUTIONAL IS NOT APPROPRIATE FOR UNITED STATES SUPREME COURT REVIEW BECAUSE THE ISSUE WAS NEITHER RAISED NOR RULED UPON IN THE LOWER COURTS AND NO COMPELLING PUBLIC INTEREST IN THE ISSUE EXISTS.

The jury in the instant case returned a verdict in favor of Deaconess Hospital and answered a special interrogatory specifically stating the Deaconess nurses were not negligent in the manner in which they accepted petitioner's anatomical donation. (App. 15a). Petitioner then argued in the court of appeals that the trial court committed error in instructing the jury on Ohio law regarding the procedure for accepting anatomical donations. (*See* Assignments of Error Nine and Ten asserted by petitioner in the Sixth Circuit Court of Appeals, App. 17a). The appellate court ruled that the trial court had indeed properly instructed the jury on the anatomical donation issue. (App. 12a-13a).

In the Petition for Writ of Certiorari, petitioner has abandoned the argument made to the court of appeals that the jury was erroneously instructed on Ohio law regarding anatomical donations. The petitioner now argues for the first time that the Ohio statute relating to the procedure for accepting anatomical donations violates petitioner's constitutional Fifth Amendment due process rights.

It has long been held that this Court normally will not review an issue which was not raised in the case in the lower courts. *Miree v. DeKalb Co.*, 433 U.S. 25, 33-34, 97 S. Ct. 2490 (1977). Justice Rehnquist ruled that "since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it." *Id.* An identical situation is presented by petitioner's fourth question presented for review in the case at bar. The issue was neither pleaded, argued nor briefed either in the district court or in the court of appeals.

As was more recently stated by this Court:

> . . . Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court . . . but also assists us in our deliberations by promoting the creation of an adequate factual and legal record . . . And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.

Adams v. Robertson, 117 S. Ct. 1028, 1031 (1997). When a legal argument is such an afterthought that it was not even raised at either lower court level, it "may be some indication of its merit." *Miree v. Dekalb Co.*, 433 U.S. at 34.

A compelling reason for review is required before this Court will grant a petition for writ of certiorari. Sup. Ct. R. 10. Such compelling reasons imply issues beyond the academic or episodic, particularly when the issues are constitutional in nature. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614 (1955). "Certiorari is granted only in cases involving principles, the settlement of which is important to the public, as distinguished from that of the parties. . ." *NLRB v. Pittsburg S.S. Co.*, 340 U.S. 498, 502, 71 S. Ct. 453 (1951); *Rice v. Sioux City Memorial Park Cemetery, supra.*

It is noteworthy that the statute to which the petitioner is asking this Court to apply Fifth Amendment scrutiny (R.C. § 2108.08) has been in effect since 1991 with no other reported challenge to its constitutionality. There is no public clamoring that the statute is unfair or misguided as the petitioner asserts. The constitutional issue petitioner is attempting to raise can therefore not be characterized as a compelling issue of public interest.

At trial, plaintiff argued Deaconess failed to comply with the anatomical donation statute. The jury disagreed. In the court of appeals, plaintiff's contention was the jury was improperly instructed on Ohio law regarding anatomical donations. With this argument, the Sixth Circuit Court of Appeals disagreed. The afterthought argument that the Ohio statute is unconstitutional, which petitioner now asserts for the first time in the Petition for Writ of Certiorari, is not an issue which meets the compelling interest threshold of Supreme Court Rule 10.

CONCLUSION

Both the trial court, in ruling on petitioner's "Motion for a New Trial/NOV," and the Sixth Circuit Court of Appeals have reviewed numerous assertions made by petitioner that there was error in the subject four week jury trial. Both courts reviewed the contentions and concluded the petitioner received a fair trial and that there was abundant evidence in support of the verdict reached. No compelling reason is present to trigger review by this Court of the lengthy factual record in this case. Respondent, Deaconess Hospital, therefore respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MARK J. HULLER
Counsel of Record
BERLON & TIMMEL
Attorneys for Respondent
Deaconess Hospital
P.O. Box 145496
Cincinnati, Ohio 45250-5496
(513) 870-2287

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION FILED JANUARY 3, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-93-520

Barbara Gleason,

Plaintiff

vs

Frank Noyes, M.D., et al.,

Defendants

ORDER

On September 8, 1995, a jury found in favor of defendants on plaintiff's claims of malpractice, inadequate informed consent and negligent infliction of emotional distress arising from the death of plaintiff's husband, William Gleason, during his 1992 admission to Deaconess Hospital for the manipulation of his knee. This matter is before the court on plaintiff's motions for judgment notwithstanding the verdict and for a new trial and defendants' memoranda in opposition. (Docs. 70, 71, 72, 75).

A court can consider a motion for a judgment notwithstanding the verdict, or as it is now called a motion for a judgment as a matter of law, only if the moving party has

previously moved for a directed verdict at the close of all the evidence. Fed. R. Civ. P. 50; *Jackson v. City of Cookeville*, 31 F.3d 1354, 1357-1358 (6th Cir. 1994) (citing *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1522 (6th Cir. 1990)). When a party has failed to make the pre-verdict motion, the court may not rule on such a motion for judgment made after the verdict. *Id.*

Plaintiff did not make a motion for judgment as a matter of law at the close of the evidence after defendants rested. *(See* Doc. 60). Therefore, this Court may not consider plaintiff's motion for judgment notwithstanding the verdict.

The motion for a new trial is based primarily on the following grounds: 1) the verdict was against the weight of the evidence; 2) several asserted erroneous evidentiary rulings pertaining to the testimony of expert witnesses; and 3) defense attorney misconduct.

In a diversity case, the question of whether a new trial should be ordered is a federal procedural question decided by reference to federal law. *Toth v. Yoder Co.*, 749 F.2d 1190, 1197 (6th Cir. 1984). According to federal law, the granting or denying of a new trial is purely within the discretion of the trial court. *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

In ruling on a motion for a new trial challenging the weight of the evidence, the court must compare the opposing proofs, weigh the evidence, and set aside the verdict only if it determines that the verdict is against the clear weight of the evidence. *United States v. L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993) (citing *Woodbridge v. Dahlberg*, 954 F.2d 1231,

1234 (6th Cir. 1992)). "The motion should be denied if the verdict is one which could reasonably have been reached, and 'the verdict is not unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable.' " *Id.* The court may not assess witness credibility, a function solely for the jury. *Cooke,* 991 F.2d at 343.

Plaintiff essentially argues that defendants' witnesses were not credible. This Court may not remake the jury's credibility determinations. There was substantial evidence from which the jury could reasonably have reached a verdict for the defendants.

An error in either the admission or exclusion of evidence may not be grounds for granting a new trial unless refusal to take such action is "inconsistent with substantial justice," Fed. R. Civ. P. 61; *TCP Industries, Inc., v. Uniroyal, Inc.,* 661 F.2d 542, 550 (6th Cir. 1981); or in the case of excluded evidence, the evidence would have caused a different outcome, *Nida v. Plant Protection Ass'n Nat'l,* 7 F.3d 522, 527 (6th Cir. 1993). This Court's rulings limiting the testimony of the expert witnesses in this case were intended, in part, to address issues of unfair surprise to the parties. Because of the abundance of expert testimony in this case from all parties, these limitations did not affect the substantial rights of the plaintiff nor would their absence have made a difference in the outcome of the trial.

Plaintiff's complaint that she was prejudiced by the lengthy curricula vitae of defendants' expert witnesses, contrary to District Judge Rubin's trial procedures, is specious. On February 6, 1995, this case was referred to the Magistrate Judge for final disposition by consent of the parties. The Magistrate Judge met with the parties on three separate occasions substantially in

advance of trial (Docs. 22, 27, 30), and at no time did this Court suggest that District Judge Rubin's trial rules would be in effect. The parties were told that the Magistrate Judge's procedures would be followed at trial. Moreover, at plaintiff's request this Court altered one of Judge Rubin's rulings by allowing plaintiff to call an additional expert witness. Although plaintiff contends that she believed that she was bound by Judge Rubin's trial procedures to limit experts' curricula vitae to one page, plaintiff did not even attempt to offer longer curricula vitae. No ruling of this Court prohibited plaintiff from providing the jury with additional information concerning her expert's qualifications, and plaintiff's failure to do so was her own choice.

Only attorney conduct that results in prejudice may serve as a basis for a new trial, *Clarksville-Montgomery County School System v. United States Gypsum Co.*, 925 F.2d 993, 1002 (6th Cir. 1991) (citing *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980)), and the burden of showing harmful prejudice rests on the moving party, *Clarksville*, 925 F.2d at 1002. The Court must assess whether there is a reasonable probability that counsel's misconduct prevented the jury from reaching a fair or impartial verdict by examining the totality of the circumstances, including the nature of the comment, the court's and the parties' reactions, and the strength of the case. *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 387 (6th Cir. 1993) (citing *City of Cleveland*, 624 F.2d at 756), *cert. denied*, 114 S. Ct. 1298 (1994).

Plaintiff's counsel failed to object to most, if not all, of the incidents now identified as attorney misconduct. Nevertheless, in some instances the Court instructed the jury to disregard counsel's comments. For example, one defense attorney urged the jury at three separate points to "stand beside" his client as

he treated and cared for the plaintiff. Despite plaintiff's failure to object, the Court admonished the jury not to associate itself or put itself in the place of any party but rather to view the case objectively, as judges not advocates.

Although one defendant's attorney inappropriately personally attacked plaintiff's counsel, plaintiff's counsel did not object and responded in kind. At the conclusion of the parties' arguments, the Court noted that it should now be clear why this phase of the trial was called argument, and directed the jury to disregard reference to matters not in evidence. The jury charge again generally instructed the jury that "statements, questions and arguments of counsel are not evidence."

Given plaintiff's general failure to object to defense counsel's conduct, the Court's curative instructions to the jury, the fact that plaintiff's counsel also engaged in similar conduct, and the substantial evidence presented by defendants, we conclude that defense attorneys' conduct did not unduly influence the verdict.

This Court has carefully examined all the other issues raised in plaintiff's motion and found them to be insufficient to warrant a new trial. Accordingly, plaintiff's motions for a judgment notwithstanding the verdict and for a new trial are DENIED.

Date: 12-26-95
hrt

s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrate Judge

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 29, 1997

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-3194/96/97

BARBARA GLEASON, As Executrix Of The Estate Of William C. Gleason, Deceased, And Individually,

Plaintiff-Appellant Cross-Appellee,

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTS-MEDICINE & ORTHOPAEDIC CENTER, INC.; RHODA MCMAHON;

Defendants-Appellees,

JEFF WINHOLT, M.D.; DEACONESS HOSPITAL;

Defendants-Appellees Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio

BEFORE: MARTIN, Chief Judge; RYAN and BATCHELDER, Circuit Judges.

RYAN, Circuit Judge. In this diversity personal-injury action, plaintiff, Barbara Gleason, appeals from a jury verdict

finding no cause of action on her claims of malpractice, lack of informed consent, and negligent infliction of emotional distress brought on behalf of the estate of her late husband, William C. Gleason. Plaintiff alleges that at trial defense counsel's closing arguments were improper and prejudicial; that the trial court erred in several of its evidentiary rulings; that two of the jury instructions were incorrect; and that the trial court's method for determining the number of jurors denied the plaintiff equal protection and due process under the law. Although we think the magistrate judge who presided over this trial made several errors, none of them substantially affected plaintiff's rights or prejudiced the jury's verdict. Therefore, the magistrate judge's denial of plaintiff's motion for a new trial will be affirmed.

I.

The parties and their counsel are very familiar with the facts of the case and the procedural details that underlie the assignments of error. Therefore, there is no need to reiterate them in this unpublished opinion.

We observe, however, as a preliminary matter that there are three standards of review applicable to this appeal: *de novo* as to rulings of law, *Miller v. Field*, 35 F.3d 1088, 1090 (6th Cir. 1994), plain error as to evidentiary admissions and exclusions that were not the subject of contemporaneous objection, Fed. R. Evid. 103(a) and (d), and abuse of discretion as to those rulings in which the magistrate judge was entitled to weigh multiple factors in making his determination, *United States v. Levy*, 904 F.2d 1026, 1029-30 (6th Cir. 1990). In addition, although harmless error is not a standard of review in the traditional sense, it is the criterion against which we test trial errors for unfair prejudice. *See* Fed. R. Civ. P. 61.

In a plain-error analysis, the affected party must show there was an error that is "clear and obvious under current law, and this error prejudicially affected the outcome of the trial. Even then, a court of appeals should exercise its discretion to reverse only when the result is a miscarriage of justice." *United States v. Rodgers*, 109 F.3d 1138, 1145 (6th Cir. 1997) (citations omitted). "Plain errors are limited to those harmful ones that are so rank that they should have been apparent to the trial judge without objection, or that strike at the fundamental fairness, honesty, or public reputation of the trial." *United States v. Causey*, 834 F.2d 1277, 1281 (6th Cir. 1987).

" 'Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.' " *Bowling v. Pfizer Inc.*, 102 F.3d 777, 780 (6th Cir. 1996) (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989)). Harmless error is one that "does not affect the substantial rights of the parties." Fed. R. Civ. P. 61.

II.

A.

The plaintiff's first assignment of error is that she was denied a fair trial because of improper comments by defendants' counsel both in their opening and closing statements to the jury.

We have no doubt that several of the comments by defense counsel were improper. First, the attorneys personally vouched for the veracity of their clients' case and against the validity of Barbara Gleason's; they engaged in personal attacks on plaintiff's counsel; they insinuated that plaintiff's experts had fabricated

their testimony; and they argued evidence which was not in the record. Second, these comments were made frequently during closing arguments. Third, many of the comments were crucial to the central issue before the jury, which was whose experts were more credible. Fourth, since Barbara Gleason offered sufficient evidence from which to conclude that her husband's death could have been prevented through different prophylactic measures, the case was close and could have been affected by defense counsel's improper conduct. Fifth, the no-cause verdicts are consistent with jury prejudice.

On the other hand, the trial court's continuing instructions and the plaintiff's failure to object to most of the matters of which she now complains mitigates the effect of defense counsel's statements. The court instructed the jury 1) to disregard any argument by the attorneys as to why any unnamed expert did not testify, 2) that the statements and arguments of counsel were not evidence, and 3) to use their own recollection of the evidence where it conflicted with the attorneys' arguments. Most importantly, the plaintiff objected only once to any of defense counsel's inappropriate arguments, and that objection was to defense counsel's benign reference to an expert-finding service, concerning whose activities there was evidence in the record. While plaintiff is correct that repeatedly objecting during defense counsel's argument could aggravate the jurors, plaintiff's counsel failed even to ask for a sidebar conference in order to draw the court's attention to opposing counsel's improper argument, or to ask the court to caution defense counsel, out of the jurors' hearing, to desist from further impermissible statements. Instead, save for one objection — and that one meritless — counsel for plaintiff did nothing.

This court has held that "[t]he determination of the extent of permissible comment and argument by counsel rests primarily

in the judicial discretion of the lower court." *Twachtman v. Connelly*, 106 F.2d 501, 509 (6th Cir. 1939).

> Indeed, whether misconduct in a trial of a cause of action is of such a nature that a fair or impartial verdict cannot be reached is in the first instance for the trial court's determination. The trial court is, of necessity, clothed with a great deal of discretion in determining whether an objectionable question is so prejudicial as to require a retrial . . . [.] The trial court is in a far better position to measure the effect of an improper question on the jury than an appellate court which reviews only the cold record. It is for this reason that this Court has declared that the power to set aside verdict [sic] for misconduct of counsel should be sparingly exercised on appeal. . . .
>
> In determining whether there is a reasonable probability that the verdict of a jury has been influenced by improper coriduct, warranting that the verdict be set aside, a court must examine, on a case-by-case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself.

City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980) (internal quotation marks and citations omitted).

Plaintiff's failure to object precludes our review of her assignment of error under any standard other than plain error.

Thus, even though it was probably "clear and obvious under current law" that defendants should not have been allowed to make some of the statements complained of, plaintiff's failure to object requires her also to show that the improper argument prejudicially affected the outcome of the trial, resulting in a miscarriage of justice. On this one issue alone, plaintiff has not met her burden. The verdict is well supported by the evidence which included expert testimony that the defendants met the relevant standards of care. In light of plaintiff's failure to object to the defense counsel's improper comments and the abundance of evidence that the defendants were not liable for William Gleason's injuries and death, we decline to set aside the jury's verdict and order a new trial.

B.

Next, plaintiff points to six instances in which the magistrate judge allegedly erred in defendants' favor in admitting or excluding evidence. While we think the magistrate judge erred with regard to at least three of the challenged rulings, we are confident that, even taken collectively, these errors did not prejudice plaid case. As we have many times observed, the parties are not entitled to a perfect or error-free trial; they are entitled to one that is fair — if imperfect — and results in a verdict supported by the properly admitted evidence. This, we think, was such a trial. The trial court's errors did not strike at the heart of plaintiffs theory of her case, and it cannot be said that correct rulings would have in any respect altered the jury's verdict.

C.

As for plaintiff's assignment of error regarding the jury instruction on intervening cause, obviously, such an argument

is irrelevant. The jury found that none of the defendants' professional conduct had fallen below the appropriate standard of care in the first place; therefore, even if the instruction was erroneous, a correct instruction would have made no difference in the outcome of the trial, because the jury did not, nor did it need to, consider causation.

D.

Plaintiff's negligent infliction of emotional distress claim is grounded in an alleged violation of Ohio Revised Code § 2108.01 which regulates anatomical gifts of human bodies or body parts. Section 2108.08 provides:

> A person who in good faith acts, or attempts to act, in accordance with sections 2108.01 to 2108.12 of the Revised Code . . . is not liable for damages in any civil action . . . .

Ohio Rev. Code § 2108.08. Barbara Gleason contends that defendant Deaconess Hospital is not entitled to the benefit of this good-faith defense because Deaconess allegedly did not comply with the statute's other terms. Specifically, section 2108.04 requires that an anatomical gift "be made in one of the following ways: . . . (3) By a telephone call in which two persons receive *the* message and one of them prepares written documentation of the message, or by a telephone call that is recorded mechanically or electronically." Ohio Rev. Code § 2108.04 (emphasis added).

Barbara Gleason contends that, because the nurses who spoke with her did so consecutively, instead of simultaneously, they did not get *the* message as purportedly required by the

statute. That is, they each got *a* message, but not necessarily the same one. However, plaintiff's reading does not appear to be warranted either by the plain meaning or the spirit of the statute. Two nurses made one phone call in which one nurse spoke to Barbara Gleason and then passed the phone to the second nurse, who Deaconess contends confirmed the information recorded by the first. Both nurses spoke with Barbara Gleason, and one documented the conversation in writing. If the message had differed between nurse one and nurse two, then they probably would not have been acting in good faith if they had proceeded. The issue of good faith should have been, and was, given to the jury to decide. There was no error.

E.

Plaintiff's argument that her constitutional rights were violated by the court impaneling nine jurors and allowing each to participate in the verdict is equally meritless. Plaintiff now objects to the local practice followed by the magistrate judge of selecting six jurors plus one alternate for every week the trial was Acted to last. Of the nine selected, none was specifically designated as an alternate, and none was dismissed during the course of the trial. Thus, all nine deliberated and returned a unanimous verdict. Plaintiff claims that she was forced to convince more people in a three-week trial than in a two-day trial, violating her right to equal protection. She also claims that not knowing how many jurors she would have to eventually convince violated due process.

Not only is the sole case cited for this proposition inapposite, plaintiff's position cannot logically be sustained. First, there would certainly be a rational basis for distinguishing

between a two-day trial and a three-week trial in terms of the potential number of jurors who would need to be excused. Second, there is nothing fundamentally unfair about having to potentially convince six, seven, eight, or nine jurors, when the result of convincing only the first six is not a defense verdict, but a mistrial. Certainly, the plaintiff bears the burden of proof as to all jurors. But there is no way of knowing, in a particular case or even on average, whether the last three jurors are going to be more or less sympathetic than the first six. And, as the Supreme Court has noted, increasing the number of jurors *increases* the reliability of verdicts. *See Ballew v. Georgia*, 435 U.S. 223, 232-39 (1978).

F.

Because plaintiff's assignments of error fail, we need not consider the merits of defendant Dr. Jeff Winholt's and defendant Deaconess Hospital's argument that they should have been granted judgment as a matter of law by the trial court. Resolution of the above issues in favor of all defendants renders Dr. Winholt's and Deaconess Hospital's cross-appeal moot.

III.

For the foregoing reasons, the trial court's denial of plaintiff's motion for a new trial is hereby **AFFIRMED**.

APPENDIX C — SPECIAL INTERROGATORIES CONCERNING NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM AGAINST DEACONESS HOSPITAL

* * *

17. Was Deaconess Hospital's employee(s) negligent in exceeding the scope of plaintiff's permission regarding donation of organs or parts from Mr. Gleason's body?

No ✓

If your answer to question 17 is "no," go to paragraph 19, but if your answer is "yes," answer the following question:

18. Was the negligence of Deaconess Hospital's employee(s) the proximate cause of serious emotional distress suffered by plaintiff?

* * *

APPENDIX D — STATEMENT OF ISSUES FOR REVIEW

1. Whether the Magistrate Judge erred in refusing to follow Ohio law as set forth in the syllabus of *Ede v. Atrium South OB-GYN, Inc.*, (1994), 71 Ohio St.3d 124.

2. Whether defense counsel will be able to profit from a continuing course of misconduct throughout the litigation and the trial by the courts upholding a defense verdict.

3. Whether the Magistrate Judge erred in permitting a "retired" anesthesiologist to testify as an expert in violation of Ohio Rule of Evidence 601(D).

4. Whether the Magistrate Judge erred in not informing plaintiff's counsel that the pre-trial order of Judge Rubin was no longer applicable as to experts' curriculum vita and permitted defendants to admit as "evidence" defense experts entire resumes.

5. Whether the Magistrate Judge erred in foreclosing cross-exam of defendant Noyes with medical texts after his case-in-chief testimony.

6. Whether the Magistrate Judge erred in strictly ruling that *nothing* could be testified to at trial that was specifically stated during the discovery depositions.

7. Whether the local practice utilized in this case of converting the alternate jurors into the final jury and not dismissing them violates the Constitutional rights of a plaintiff in having a large number of people to convince?

8. Whether the Magistrate Judge erred in instructing the jury with a "but-for" test and intervening cause definition as to causation.

9. Whether the Magistrate Judge erred in instructing the jury on "good faith" [Ohio Revised Code 2108.08] immunity under the circumstances.

10. Whether the Magistrate Judge erred in permitting testimony concerning a written consent form in violation of Ohio Revised Code 2317.54.

FILED
MAR 11 1998
OFFICE OF THE CLERK

No. 97-1164

(4)

In The

Supreme Court of the United States

October Term, 1997

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,

Petitioner,

vs.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; JEFF WINHOLDT, M.D.; DEACONESS HOSPITAL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF IN OPPOSITION FOR RESPONDENTS JEFF WINHOLDT, M.D.; FRANK R. NOYES, M.D. AND CINCINNATI SPORTS MEDICINE & ORTHOPAEDIC CENTER, INC.

JAMES F. BROCKMAN
Counsel of Record
LINDHORST & DREIDAME
Attorneys for Respondents Frank R. Noyes, M.D. and Cincinnati Sportsmedicine & Orthopaedic Center, Inc.
312 Walnut Street, Suite 2300
Cincinnati, Ohio 45202-4091
(513) 421-6630

R. GARY WINTERS
Counsel of Record
McCASLIN, IMBUS & McCASLIN
Attorneys for Respondent Jeff Winholdt, M.D.
632 Vine Street, Suite 900
Cincinnati, Ohio 45202-2442
(513) 421-4646

145198

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STATEMENT PURSUANT TO RULE 29.6

Respondent Cincinnati, Sportsmedicine & Orthopaedic Center, Inc., has no parent company and no nonwholly owned subsidiaries.

INTRODUCTION

This case presents no compelling basis for certiorari. The Petitions argument disposed of by the Sixth Circuit is not in conflict with the decision of another United States Court of Appeal; nor has the decision of the Sixth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power nor does the petition present a constitutional question.

Simply stated, petitioner's argument turns on the narrow and unique facts of the case which are only of interest to the parties and fact canvassing is not a task to be served by a grant of a writ of certiorari.

STATEMENT OF THE CASE

Petitioner's decedent, a Michigan resident, had developed advanced arthritis in his left knee and came to the Cincinnati area in August 1992 to be evaluated by Dr. Frank Noyes, an orthopaedic surgeon. Mr. Gleason's knee condition continued to worsen to the point where he needed a knee joint replacement which was performed by Dr. Noyes in November 1991.

Prior to the surgery, because Mr. Gleason had a history of deep vein thrombosis and pulmonary embolism, Dr. Noyes brought in two consultants to evaluate the patient's medical factors relating to blood clotting, to form a plan to minimize a risk of a recurrence of deep vein thrombosis and pulmonary embolism and to recommend an appropriate anesthetic during the knee surgery.

Following the knee surgery, Mr. Gleason developed scar tissue in the knee joint which was removed by a second surgical procedure. By February 1992 Mr. Gleason began to lose satisfactory motion in his knee and he was admitted to the hospital for a third time for a knee manipulation under a continuous epidural anesthetic. The purpose of the epidural was to provide pain relief during the procedure itself and thereafter. Two days following the

manipulation, while he was still in the hospital, Mr. Gleason passed away as a result of fresh blood clots in his lungs.

Petitioners instituted a wrongful death medical negligence case against respondents Frank Noyes, M.D.; Jeff Winholdt, M.D., the anesthesiologist; Deaconess Hospital, the claim against the latter being that a physical therapist employed by the hospital failed to detect signs and symptoms consistent with deep vein thrombosis and that the hospital had unlawfully and without the consent of the widow, harvested certain portions of Mr. Gleason's body for transplant purposes.

After a four week trial a nine member jury unanimously granted judgment in favor of all three respondents. Petitioner then filed a motion for new trial/JNOV which was denied.

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the jury verdict and the trial court's denial of petitioner's motion for a new trial.

A petition for a rehearing *en banc* was denied.

REASONS FOR DENYING THE WRIT

I. During the course of the trial it was brought to the court's attention that Dr. Noyes and two of the experts that testified on this behalf were provided with liability insurance coverage by the same insurer. In reliance upon the Ohio Supreme Court of *Ede v. Atrium South OB/GYN, Inc.*, 71 Ohio St. 3d 124 (1994) petitioner sought to offer evidence of a commonality of insurance interests in an effort to demonstrate bias. The magistrate judge precluded such evidence being offered for the reason that it was far to prejudicial.

In *Ede*, the trial court in construing Ohio Evidence Rule 403, in substance held that evidence of insurance was so potentially prejudicial as to outweigh its probative value. However, the Ohio Supreme Court held that the trial court abused its discretion and in

applying Ohio Evidence Rule 411 held that evidence of a commonality of insurance interest between a defendant and an expert witness was sufficiently probative of the experts bias as to outweigh any potential prejudice evidence of insurance may cause.

Fed. R. Evid. 1101, with a few exceptions not herein inapplicable, in substance provides that the Fed. R. Evid. apply to the United States District Court in civil actions and proceedings.

In diversity cases, the states substantive law applies, however, in matters of procedure such as admissibility of evidence, the Fed. R. Evid. apply. *Granada Steel Indus. Inc. v. Alabama Oxygen, Inc.*, 695 F.2d 883 (6th Cir. 1983); *McInnis v. AMF, Inc.*, 765 F.2d 240 (1st Cir. 1985); *Raimer v. United States*, 396 U.S. 965.

Ohio Evidence Rule and Federal Evidence Rule 403 and 411 are virtually identical. The magistrate judge was not bound by Ohio's interpretation of its Rules of Evidence and did not abuse its discretion by precluding evidence of insurance as being so potentially prejudicial as to outweigh its probative value. *Finch v. Monumental Life Ins. Co.*, 820 F.2d 1426 (6th Cir. 1987).

The Sixth Circuit in its unpublished opinion did not address this perceived assignment of error. It combined six assignments of error where it was alleged that the magistrate judge improperly admitted or excluded evidence and held that while the magistrate judge erred with regard to at least three of the challenged errs, even taken collectively, these errs did not prejudice petitioners case and that it could not be said that correct rulings would have in any respect altered the jury's verdict.

II. During final argument several comments were made by defense counsel which the Sixth Circuit held to be improper but which were not objected to by petitioner's counsel. Following the verdict, petitioner filed a motion for a new trial/judgment notwithstanding the verdict, arguing that the comments by defense counsel in closing argument were prejudicial. In overruling the motion the magistrate judge held that petitioner's counsel failed to object to the improper comments, that curative instructions were

given to the jury, that petitioner's counsel engaged in similar conduct and that substantial evidence was presented by respondents to support the verdict.

In affirming, the Sixth Circuit held that the trial court's continuing curative instructions and the petitioner's failure to object to most of the improper comments by defense counsel mitigated the effect of said comments.

In citing *Twatchman v. Connelly*, 106 F.2d 501, 509 (6th Cir. 1939), the court properly held that the trial court is clothed with a great deal of discretion in determining whether an objectionable question is so prejudicial as to require a retrial and is in the best position to measure the affect of an improper question on the jury than a reviewing court which can only look at the cold record. The general rule is that decisions of a trial judge based on the assessment of the prejudicial impact of allegedly improper argument of counsel is entitled to great deference. *Arizona v. Washington*, 434 U.S. 497, 514 (1978).

The court further stated that petitioner's failure to object precludes review under any standard other than plain error even if the error was "clear and obvious under current law". Petitioner's failure to object imposes upon him the burden of demonstrating that the improper argument prejudicially affected the outcome of the trial resulting in a miscarriage of justice. In holding that the petitioner had not sustained her burden, the magistrate judge as well as the Sixth Circuit held that the verdict was well supported by the evidence and that the jury's verdict should not be set aside and a new trial ordered.

III. While petitioner claims that Fed. R. Civ. P. 48 violates the due process clause of the Fourteenth Amendment to the United States Constitution, absolutely no authority is cited nor does the petitioner set forth any cogent or logical argument to sustain her argument.

Rule 48 of the Fed. R. Civ. P. provides that the court shall seat a jury of not fewer than six and not more than 12 and all

jurors shall participate in the verdict which must be unanimous unless the parties otherwise stipulate. Prior to the trial, the magistrate judge, with the agreement of counsel, decided to impanel a jury of 9 in view of the fact that the anticipated time for the trial would be approximately three weeks. As it turned out, the trial lasted four weeks. The magistrate judge's decision to add three jurors was consistent with the local practice of the district to select six jurors plus one for every week the trial was expected to last with those jurors beyond six not being designated as alternates. With none of the original nine jurors being unable to serve throughout the trial, all nine deliberated and returned a unanimous verdict for the respondents.

Petitioner perceived that her burden of convincing nine jurors rather than six imposed a heavy, unfair and unconstitutional burden. However, as properly noted by the Sixth Circuit in its opinion:

> There is nothing fundamentally unfair about having to potentially convince six, seven, eight or nine jurors, when the result of convincing only the first six is not a defense verdict, but a mistrial. Certainly the plaintiff bears the burden of proof as to all jurors. But there is no way of knowing, in a particular case or even on average, whether the last three jurors are going to be more or less sympathetic than the first six. And, as the supreme court has noted, increasing the number of jurors increases the reliability of verdicts,

Citing *Ballew v. Georgia*, 435 U.S. 223, 232-39 (1978).

CONCLUSION

There is no compelling reason for the United States Supreme Court to review the decisions of the two lower courts which in substance held that petitioner received a fair trial.

Respectfully submitted,

R. GARY WINTERS
Counsel of Record
McCASLIN, IMBUS & McCASLIN
Attorneys for Respondent
Jeff Winholdt, M.D.
632 Vine Street, Suite 900
Cincinnati, Ohio 45202-2442
(513) 421-4646

JAMES F. BROCKMAN
Counsel of Record
LINDHORST & DREIDAME
Attorneys for Respondents
Frank R. Noyes, M.D. and
Cincinnati Sportsmedicine & Orthopaedic Center, Inc.
312 Walnut Street, Suite 2300
Cincinnati, Ohio 45202-4091
(513) 421-6630